

Customs Bulletin

Regulations, Rulings, Decisions, and Notices
concerning Customs and related matters



and Decisions

of the United States Court of Customs and
Patent Appeals and the United States
Customs Court

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Tariff Commission Notices

THE DEPARTMENT OF THE TREASURY
Bureau of Customs

NOTICE

The abstracts, rulings, and notices which are issued weekly by the Bureau of Customs are subject to correction for typographical or other printing errors. Users may notify the Bureau of Customs, Facilities Management Division, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

Bureau of Customs

(T.D. 73-181)

Manmade fiber textiles—Restriction on entry

Restriction on entry of manmade fiber textile products manufactured or produced in the Republic of Korea

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., July 2, 1973.

There is published below the directive of June 22, 1973, received by the Commissioner of Customs from the Chairman, Committee for the Implementation of Textile Agreements, amending levels of restraint established in the directive of September 28, 1972 (T.D. 72-294) for manmade fiber textile products in certain categories manufactured or produced in the Republic of Korea.

This directive was published in the Federal Register on June 25, 1973 (38 F.R. 16680), by the Committee.

(343.3)

G. H. HEIDBREDER,
*Acting Director, Appraisement
and Collections Division.*

THE ASSISTANT SECRETARY OF COMMERCE
WASHINGTON, D.C. 22030

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

June 22, 1973.

COMMISSIONER OF CUSTOMS
*Department of the Treasury
Washington, D.C. 20229*

DEAR MR. COMMISSIONER:

On September 28, 1972, the Chairman, Committee for the Implementation of Textile Agreements, directed you to prohibit entry of wool and man-made fiber textile products in certain specified categories produced or manufactured in the Republic of Korea during the twelve-month period beginning October 1, 1972, in excess of designated

levels of restraint. The Chairman further advised you that the levels of restraint are subject to adjustment.¹

Pursuant to paragraph 5 of the bilateral Wool and Man-Made Fiber Textile Agreement of January 4, 1972, between the Governments of the United States and the Republic of Korea and in accordance with the procedures of Executive Order 11651 of March 3, 1972, you are directed to amend, effective as soon as possible, the levels of restraint established in the aforesaid directive of September 28, 1972 for man-made fiber textile products in Categories 200-205 and 241-243, as a group; Categories 214-240, as a group; and individual Category 219 as set forth below:

<i>Category</i>	<i>Amended Twelve-Month Levels of Restraint²</i>
200-205 and 241-243	31,498,882 square yards equivalent
214-240	326,299,518 square yards equivalent
219	3,634,293 dozen

You are further directed to maintain a record of the visa number of man-made fiber textile products in Category 219 exported from Korea and permitted entry under this directive.

The actions taken with respect to the Government of the Republic of Korea and with respect to imports of wool and man-made fiber textile products from the Republic of Korea have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, being necessary to the implementation of such actions, fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

ALAN POLANSKY,
*Acting Chairman, Committee for the
Implementation of Textile Agreements, and
Acting Deputy Assistant Secretary for
Resources and Trade Assistance*

¹ The term "adjustment" refers to those provisions of the bilateral Wool and Man-Made Fiber Textile Agreement of January 4, 1972, between the Governments of the United States and the Republic of Korea which provide, in part, that within the aggregate and applicable group limits, limits on certain categories may be exceeded by not more than five (5) percent; for the limited carryover of shortfalls in certain categories to the next agreement year; for limited inter-fiber flexibility between cotton textiles and man-made fiber textile products of the comparable category; and for administrative arrangements.

² These amended levels of restraint have not been adjusted to reflect any entries made on or after October 1, 1972.

(T.D. 73-182)

Cotton textiles—Restriction on entry

Restriction on entry of cotton textiles manufactured or produced in Colombia

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., July 2, 1973.

There is published below the directive of June 13, 1973, received by the Commissioner of Customs from the Chairman, Committee for the Implementation of Textile Agreements, amending a level of restraint established in the directive of June 28, 1972 (T.D. 72-202) for textiles in categories 22 and 23 manufactured or produced in Colombia.

This directive was published in the Federal Register on June 26, 1973 (38 F.R. 16814), by the Committee.

(QUO-2-1)

JOHN D. ROBISON,
*Acting Director, Appraisal
and Collections Division.*

THE ASSISTANT SECRETARY OF COMMERCE
WASHINGTON, D.C. 20230

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

June 13, 1973.

COMMISSIONER OF CUSTOMS
*Department of the Treasury
Washington, D.C. 20229*

DEAR MR. COMMISSIONER:

On June 28, 1972, the Chairman, Committee for the Implementation of Textile Agreements, directed you to prohibit entry during the twelve-month period beginning July 1, 1972 of cotton textiles and cotton textile products in certain specified categories produced or manufactured in Colombia in excess of designated levels of restraint. The Chairman further advised you that the levels of restraint are subject to adjustment.¹

¹ The term "adjustment" refers to those provisions of the bilateral Cotton Textile Agreement of June 25, 1971 between the Governments of the United States and Colombia which provide, in part, that within the aggregate and applicable the group limits, limits on certain categories may be exceeded by not more than 5 percent; for the limited carryover of shortfalls in certain categories to the next agreement year; and for administrative arrangements.

Under the terms of the Long-Term Arrangement Regarding International Trade in Cotton Textiles done at Geneva on February 9, 1962, pursuant to paragraph 9 of the bilateral Cotton Textile Agreement of June 25, 1971 between the Governments of the United States and Colombia, and in accordance with the procedures of Executive Order 11651 of March 3, 1972, you are directed to amend, effective as soon as possible, the level of restraint established in the aforesaid directive of June 28, 1972 for cotton textile products in Category 22/23 to 8,360,000 square yards.²

The actions taken with respect to the Government of Colombia and with respect to imports of cotton textiles and cotton textile products from Colombia have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, being necessary to the implementation of such actions fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

SETH M. BODNER,

*Chairman, Committee for the Implementation
of Textile Agreements, and
Deputy Assistant Secretary for
Resources and Trade Assistance*

² This level has not been adjusted to reflect any entries made on or after July 1, 1972.

Decisions of the United States Court of Customs and Patent Appeals

(C.A.D. 1105)

COMMONWEALTH OIL REFINING COMPANY, INC. *v.* THE UNITED STATES, THE UNITED STATES *v.* COMMONWEALTH OIL REFINING COMPANY, INC. Nos. 5488-5489 (—F.2D—)

1. LIQUIDATION—NOTICE

Importer appeals from the dismissal of protests on the ground that they were filed more than sixty days after liquidation and asserts lack of notice of liquidation in conformance with Customs Regulations § 16.2d. We agree with the Customs Court that adequate notice was given.

2. REHEARING—DISCRETIONARY WITH CUSTOMS COURT

The Customs Court is entrusted with exercise of its sound discretion in ruling on petitions for rehearing, and since we have not been shown that the court's ruling in the present case was manifestly erroneous, we will not disturb it.

3. SCOPE OF REVIEW

We will not disturb findings of fact supported by substantial evidence of record and not contrary to the weight of the evidence.

4. NOTICE OF LIQUIDATION

While such a practice might not deserve encouragement, the posting of a bulletin notice of liquidation on the date of liquidation where that date is the only one appearing on the document satisfies the mandatory requirement of Customs Regulations § 16.2(d) that bulletin notices of liquidation be dated with the date of posting.

5. *Id.*—CONSTRUCTIVE

Pre-dating of a bulletin notice of liquidation coupled with posting no later than the date of liquidation complies literally with the constructive notice provision of the Customs Regulations and is not inconsistent with the spirit of that provision.

6. ACTS OF OFFICERS, DUE PERFORMANCE OF

It is presumed that public officials perform their duties in a manner consistent with law.

7. CLASSIFICATION—GAS OIL

The Government appeals from the decision and judgment of the Customs Court agreeing with the importer that gas oil similar to that here imported had long been classified as fuel oil by the Bureau of Customs and holding that a construction of "fuel oil" as used in the relevant statutory provisions which encompasses the imported Venezuelan gas oil is, by virtue of the long established administrative practice, controlling. We affirm.

8. CONGRESSIONAL INTENT—ADMINISTRATIVE PRACTICE

Long-established administrative practice may bear on the construction of the tariff laws in a manner comparable to other extrinsic aids to ascertaining legislative intent which come into play when the construction of a statutory provision is in doubt.

9. ADMINISTRATIVE PRACTICE

We agree with the Government that inquiry relevant to long-established administrative practice should not be one which weighs the merits of the practice at one port against the merits of the practice at another port occurring approximately contemporaneously.

United States Court of Customs and Patent Appeals, June 28, 1973

Appeal from United States Customs Court, C.D. 4248

[Affirmed.]

Robert S. Stitt, (Thacher, Proffitt, Prizer, Crawley & Wood), attorneys of record for Commonwealth Oil Refining Company, Inc.

Harlington Wood, Jr., Assistant Attorney General, *Andrew P. Vance*, Chief, Customs Section, *Gilbert Lee Sandler* for the United States.

[Oral argument January 8, 1973 by Mr. Stitt and Mr. Sandler]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, LANE, *Associate Judges*, and CLARK, *Justice*, (Ret.), sitting by designation.

LANE, *Judge*.

This is an appeal and cross-appeal from the decision and judgment of the Customs Court, 67 Cust. Ct. 37, 330 F. Supp. 598, C.D. 4248 (1971), dismissing some protests and sustaining others after a consolidated trial of all the protests. The involved merchandise is described as gas oil. It was exported from Venezuela and entered at the port of Ponce, Puerto Rico, during the period 1962-1968.

[1] No. 5488 is the appeal of the importer (hereafter referred to as Commonwealth) from the decision of the Customs Court granting the Government's motion to dismiss some of the protests on the ground that they were filed more than sixty days after liquidation. See § 514 of the Tariff Act of 1930. Commonwealth contends that the court was in error in finding that adequate notice of liquidation had been given. We disagree and affirm the court's judgment in No. 5488.

No. 5489 is the Government appeal from the court's decision sustaining the importer's protest to the classification of the goods. For the reasons set forth below, we also affirm the court's judgment in Appeal No. 5489.

We consider the two appeals seriatim in one opinion.

APPEAL No. 5488—NOTICE OF LIQUIDATION

Where notice of liquidation has not been given in accordance with the requirements of Customs Regulations prescribed by the Secretary of the Treasury in conformance with § 505 of the Tariff Act of 1930, the liquidation is incomplete and the 60-day period specified in § 514 of the Tariff Act of 1930 does not begin to run. *United States v. Astra Bentwood Furniture Co.*, 28 CCPA 205, C.A.D. 147 (1940). See also *Commonwealth Oil Refining Co. v. United States*, 67 Cust. Ct. 155, 332 F. Supp. 203, C.D. 4267 (1971). Section 16.2(d) of the Customs Regulations, 19 CFR § 16.2(d), sets forth the form and manner in which notice of liquidation is to be given, and reads in pertinent part as follows:

The bulletin notice of liquidation shall be posted as soon as possible in a conspicuous place in the customhouse for the information of importers or lodged at some other suitable place in the customhouse in such a manner that it can be readily located and consulted by all interested persons, who shall be directed to that place by a notice maintained in a conspicuous place in the customhouse stating where notices of liquidations of entries are to be found. The bulletin notice of liquidation shall be dated with the date of posting or, if not posted, with the date it is lodged in the above-described place for the information of importers.

Commonwealth contends that the requirements of notice were not satisfied in this case in essentially two particulars: (1) that the bulletin notice of liquidation was not posted in a "conspicuous" place but rather in "some other suitable place" to which there was no posted direction and (2) that the bulletin notice of liquidation was not dated with either the date of posting or lodging.

A substantial portion of the testimony and evidence adduced at trial is directed to the liquidation procedure in force in the 1963-64 period during which the merchandise involved in the dismissed protests was imported. The testimony and evidence are summarized in detail in the published opinion of the lower court.

Briefly, it appears that the gas oil in question was officially entered at Ponce, Puerto Rico, but liquidated at San Juan. The practice at San Juan included a determination of duty followed by the preparation of the bulletin notice of liquidation. With respect to those notices destined for Ponce, a clerk would assign a liquidation date some ten to fourteen

days in the future and mail them to the Ponce customhouse. The notices were apparently supposed to be dated at Ponce when posted and then placed on a clipboard. There is substantial dispute as to whether the notices were dated when posted and as to the location of the clipboard in the Ponce customhouse.

The original bulletin notices relating to the specific entries involved here were not located, although other records pertaining to their liquidation were introduced in evidence. The Customs Court reviewed the record developed at trial and made several factual determinations.

The court found that the liquidating procedures used resulted in the mailing of the bulletin notices from San Juan to Ponce well in advance of the liquidation date pre-stamped on the notices and the posting of the notices on the date of liquidation. The court also determined that the date of posting was normally stamped on the notices.

As to clipboard location, the court found that the clipboard normally hung on a nail on a wall near one of the windows at which customs business was transacted, although it occasionally might have been left on a counter. Relying on *Standard Oil Co. of Louisiana v. United States*, 33 CCPA 152, C.A.D. 329 (1946), and finding that when hung on the wall the clipboard containing the bulletin notices was plainly visible and accessible, the court concluded that the notices were posted in a "conspicuous" place within the meaning of Customs Regulations § 16.2(d), *supra*.

Based on the findings made, a conclusion of compliance with the requirements of liquidation notice was reached.

OPINION

(1) The "conspicuous place" question

After the Customs Court's decision, Commonwealth filed a motion requesting rehearing on the basis of testimony given by a Government witness in a different proceeding, *Commonwealth Oil Refining Co. v. United States*, 67 Cust. Ct. 155, 332 F. Supp. 203, C.D. 4267 (1971), bearing on the location of the clipboard in the Ponce customhouse during the relevant period. The motion was opposed by the Government, and the court denied it.

Commonwealth contends that the court below should have granted the petition for rehearing and considered the evidence Commonwealth sought to introduce. However, [2] the Customs Court is entrusted with the exercise of its sound discretion in ruling on petitions for rehearing of the causes brought before it. See *The Taggesell Co. v. United States*, 17 CCPA 15, 18, T.D. 43318 (1929); *United States v. Shell Oil Co.*, 44 CCPA 54, 56, C.A.D. 637 (1957). We have not been shown that the court's ruling in the present case was manifestly er-

aneous, and we therefore will not disturb it. We accordingly do not consider the evidence sought to be introduced.

[3] We find that the determination of the Customs Court with respect to the location of the clipboard in the Ponce customhouse is supported by substantial evidence of record and is not contrary to the weight of the evidence. See *United States v. F. W. Myers & Co.*, 45 CCPA 48, 52 C.A.D. 671 (1958). We will not disturb the findings of fact in that regard. We agree that the bulletin notices of liquidation at issue here were posted in a conspicuous place in the Ponce customhouse in accordance with the terms of § 16.2(d) of the Customs Regulations.

(2) The "date of posting" question

Commonwealth primarily asserts that the weight of the evidence supports the conclusion that the bulletin notices of liquidation were not "dated with the date of posting * * *" as mandated by the Customs Regulations. Commonwealth also disagrees that there is substantial evidence to support the determination of the Customs Court that the notices were posted on the date of *liquidation* and challenges a conclusion that such coincidence of dates would in any event satisfy the "date of posting" requirement of the regulation. In that regard, Commonwealth argues the following:

There is nothing to suggest that this requirement can be satisfied by a predated date of liquidation stamped on the document before mailing [from San Juan] to the sub-port [of Ponce] for posting. To so construe the regulation would violate its plain language and would deprive an importer of an important means of safeguarding full governmental compliance with its mandate, namely, that the notice be posted "as soon as possible" for his information.

[4] We think that while such a practice might not deserve encouragement, the posting of the bulletin notice on the date of liquidation where that date is the only one appearing on the document satisfies the mandatory terms of the Regulations. In such a situation, the date of posting in fact appears on the document thus literally complying with the "date of posting" requirement. Although Commonwealth generally asserts that the practice would lead to posting at a time other than "as soon as possible," there is no supportive foundation for such an assertion. In any event, there has been no charge that the bulletin notices of liquidation were not posted "as soon as possible," and we need not attempt to construe the import of that phrase.

The critical date from the standpoint of protest filing is the date of liquidation. Posting subsequent to the date of liquidation could well give rise to actual prejudice to the importer. However, posting on or before that date would not be prejudicial. [5] The pre-dating

procedure used in San Juan was structured to avoid posting subsequent to liquidation. We conclude that pre-dating complies literally with the constructive notice provision of the Customs Regulations and is not inconsistent with the spirit of that provision.

Commonwealth has not directed our attention to evidence tending to prove that the notices here involved were not posted on the date of liquidation, as found by the Customs Court, and we have found no such evidence. [6] It is presumed that public officials perform their duties in a manner consistent with law, see *Olavarria & Co. v. United States*, 47 CCPA 65, 66, C.A.D. 729 (1960), and under our construction of § 16.2(d), the posting of pre-dated notices on the date of liquidation is such a manner. We agree with the Government that Commonwealth has failed to rebut the presumption. We also think there is substantial evidence of record which supports the determination of the Customs Court that the notices were posted on the date of liquidation.

Conclusion

We are not persuaded of error in the Customs Court's holding that notice of liquidation was given in accordance with the conditions of § 16.2(d) of the Customs Regulations. Notice having been properly given, and protest not having been timely made with respect to the entries enumerated in the lower court's published opinion, dismissal of those protests was proper. We accordingly *affirm* the judgment of the Customs Court in Appeal No. 5488.

APPEAL NO. 5489—CLASSIFICATION OF THE MERCHANDISE

The merchandise consists of gas oil which is a petroleum distillate separated from the crude oil in the initial stage of the refining process. The gas oil was imported from Venezuela and then further refined at Commonwealth's plant at Guaynilla Bay, Puerto Rico, to produce gasoline.

Since the entires involved in the consolidated protests spanned a period during which the tariff laws were changed, there are separate provisions for gas oil imported up to August 30, 1963, and that imported after that date. In either case, the essence of the dispute arises out of classification of the imported gas oil by customs officials at Puerto Rico as a liquid derivative of crude petroleum whereas Commonwealth claims that it should be classified as fuel oil.

[7] The Customs Court agreed with Commonwealth that gas oil similar to that here imported had long been classified as fuel oil by the Bureau of Customs and concluded that a construction of "fuel oil" as used in the relevant statutory provisions which encompasses Venezuelan gas oil is, by virtue of the long established administrative

practice, controlling. The Government seeks reversal of the decision of the Customs Court sustaining the timely filed protests contending that to be classified as fuel oil, the imported gas oil would have to be chiefly used as fuel oil which, in fact, it is not. On appeal, Commonwealth urges that the court below correctly found the existence of a uniform and consistent administrative practice and contends that such practice extended from as early as 1922 to at least 1967 with the exception of the action of the customs officials responsible for classification of the goods here involved. The Government is of the view that no such practice has been proved and that in any event such practice, even if found to exist, should not override the plain meaning of "fuel oil" as oil chiefly used in its imported state as fuel.

The Statutory Provisions

The evolution of the statutory provisions at issue is relevant to our inquiry. Paragraph 1733 of the Tariff Act of 1930, which was similar in all material respects to paragraph 1633 of the Tariff Act of 1922, provided free entry of petroleum products. The imported goods were classified under paragraph 1733 of the 1930 Act, and that classification is not disputed. The provision reads as follows:

Oils, mineral: Petroleum, crude, fuel, or refined, and all distillates obtained from petroleum, including kerosene, benzine, naphtha, gasoline, paraffin, and paraffin oil, not specially provided for.

Therefore, from at least the effective date of the 1922 Act, gas oil was unquestionably entitled to free entry whether considered a fuel oil or simply a distillate of petroleum. However, duty was imposed by virtue of the Internal Revenue Code of 1939, § 3422 of which reads as follows:

Crude petroleum, $\frac{1}{2}$ cent per gallon; fuel oil derived from petroleum, gas oil derived from petroleum, and all liquid derivatives of crude petroleum, except lubricating oil and gasoline or other motor fuel, $\frac{1}{2}$ cent per gallon.

As can be seen, § 3422 expressly provided for "gas oil derived from petroleum." Under the Venezuelan Trade Agreement of 1939, T. D. 50015, § 3422 of the I.R.C. was modified to reduce the rate of duty to $\frac{1}{4}$ ¢ per gallon on:

Crude petroleum, topped crude petroleum, and fuel oil derived from petroleum including fuel oil known as gas oil.

In a published letter from W. R. Johnson, Commissioner of Customs, to the collector at New York dated December 16, 1939, 75 Treas. Dec. 248, T.D. 50060, the following was said concerning the Venezuelan Trade Agreement, T.D. 50015:

* * * prior to the enactment of the Revenue Act of 1932, certain specifications were developed and approved by various industries and were promulgated and issued by the Department of Commerce in 1929 as Commercial Standards CS12-29. Oil which meets these specifications and is known as fuel oil or gas oil, should be regarded as within the description in item 3422 * * *.

By Presidential Proclamation of 1952, T.D. 53107, the Venezuelan Trade Agreement of 1939 was supplemented so that 3422 of the I.R.C. was written in the form which governs the duty to be imposed on those goods here imported up to August 30, 1963. The provisions read as follows:

[Claimed as]

Crude petroleum, topped crude petroleum, and fuel oil derived from petroleum (including fuel oil known as gas oil):

Testing under 25 degrees A.P.I.----- $\frac{1}{8}\phi$ per gal.

[Classified as]

Liquid derivatives of crude petroleum * * *---- $\frac{1}{4}\phi$ per gal.

Included in the Treasury Decision publication of T.D. 53107 is a letter "To Collectors of Customs and Others Concerned," written by Frank Dow, Commissioner of Customs, 87 Treas. Dec. 283 (1952), which states:

You will note that, by virtue of these proclamations, the tariff-rate quota on crude petroleum, fuel oil, gas oil, and topped crude petroleum will be removed, and the import tax assessable under section 3422, Internal Revenue Code, will be reduced from $\frac{1}{4}$ cent to $\frac{1}{8}$ cent per gallon on these products testing under 25 degrees A.P.I. * * *

The Tariff Schedules enacted pursuant to the Customs Simplification Act of 1954 apply to the gas oil here imported subsequent to August 30, 1963. The relevant provisions are as follows:

[Classified as]

Mixtures of hydrocarbons not specially provided for, derived wholly from petroleum, shale, oil, natural gas, or combinations thereof, which contain by weight not over 50 percent of any single hydrocarbon compound:

475.65 In liquid form----- [$\frac{1}{4}\phi$ per gal.]

[Claimed as]

Crude petroleum (including reconstituted crude petroleum); topped crude petroleum; crude shale oil; and distillate and residual fuel oils ((including blended fuel oils) derived from petroleum, shale, or both, with or without additives.

475.05 Testing under 25 degrees A.P.I.----- [$\frac{1}{8}\phi$ per gal.]

Although as compared to § 3422 of I.R.C., as modified by T.D. 53107, TSUS item 475.05 makes no mention of "fuel oil * * * (including fuel oil known as gas oil)," and refers to "distillate and residual fuel oils," the Government does not advance any contention to the effect that TSUS perfected a change in the treatment of gas oil such as that here involved. The Government's position is that the imported gas oil is not classifiable as a fuel oil in either case.

The Nature of the Gas Oil

Sam Zamudio, a chemical engineer by degree and technical adviser to the vice president of Commonwealth responsible for refining and petrochemicals, was called by Commonwealth and testified as to the nature of gas oil. Zamudio characterized gas oil as "in essence, part of crude oil * * * derived [in fact] from the very first distillation step of crude oil." He noted that the gas oil is a distilled fraction which has been separated from the crude, but unchanged. Direct examination of Zamudio included the following:

Q. Now, will this gas oil we have been talking about burn?

A. Yes, it would burn like every other hydro-carbon.

Q. And will it produce heat and power? A. Yes. The gas oil ranges will burn without any particular difficulty. They normally produce about 18,500 BTU's to the bound [sic: pound?] of heat release.

Q. Could the gas oil be marketed in its imported form?

* * * A. Well, yes, the gas oil, as such, could be marketed in its imported form, and it would be marketed under the regulations of No. 5 fuel oil.

Q. Now, is such gas oil, in fact, marketed in imported form?

A. No, because from a practical point of view all refineries are in the process of generating optimum profits or at least this is what we all strive for. Any gas oil, as such, must be processed further to optimize on profitability. Marketing gas oil in its raw form, as such, would be a loss of money.

Q. Now, how is gas oil, again speaking generally within the industry, further refined? A. Earlier, when I was telling you about the virgin and cracked fractions—a virgin fraction such as gas oil would be processed by any one of two means, either thermal decomposition or catalytic decomposition. In our plant, we don't have any thermal crackers for gas oil but we do have catalytic crackers. So, therefore, the gas oil is processed through a catalytic cracker down to fractions, similar to those of crude oil, gas, gasolines, naphthas, and cycle oils.

Q. How long has it been industry practice to further refine a crack gas oil? A. Well, this has started from what I would call day 1. The day somebody took oil out of the ground it really wasn't very good in its physical form, but boiling it off and taking off the light ends, and throwing away the heavy residuals did

produce distillates used for heating oil, lamps, early gasoline engines, and that sort of thing. So, this really starts from the day that the industry got going.

One of the exhibits received in evidence (Exhibit 32), a publication of the Commerce Department which discusses fuel oils, describes "No. 5" fuel oil as "Residual-type oil for burner installations equipped with preheating facilities." It defines the minimum flash point, maximum water and sediment content, maximum ash content, and viscosity ranges of No. 5 fuel oil. The record includes other source material concerning the nature of No. 5 fuel oil.

The Customs Court stated as follows:

Mr. Zamudio's testimony was clear in its assertion that the importations could be marketed in their imported form as No. 5 fuel oil. The court has examined a multitude of source materials placed in evidence for the purpose of clarifying the nature of fuel oils and their identifying characteristics. [Footnote omitted.] The court has also examined the customs laboratory report cards relating to the importations. Concerning these, the parties stipulated that "[n]otwithstanding the statements on the various customs laboratory report cards that the samples did not conform to ASTM (American Society for Testing Materials) or other specifications for fuel oil, the only tests conducted of the plaintiff's gas oil importations were those specifically enumerated on the cards themselves, namely API gravity, viscosity and, in some cases, sediment and water." The important tests for flash point and ash contents were not performed. Thus the laboratory reports, as far as they went, are consistent with a finding that the importations possessed the characteristics of No. 5 fuel oil, while the positive testimony of Mr. Zamudio—unrebutted and uncontradicted—serves to establish the fact that the imported gas oil did indeed possess the characteristics of No. 5 fuel oil.

We think that there is substantial evidence to support the trial court's determination that the imported gas oil "possessed the characteristics of No. 5 fuel oil." However, there is no assertion by Commonwealth that the goods are in fact used as fuel oil, and the indication is that use as fuel oil is commercially impractical. The evidence tends to prove that the importations were in fact further refined. We conclude that the imported gas oil possesses the characteristics of No. 5 fuel oil. However, we also conclude that it is not chiefly used as such and that it would not be economically feasible to use the gas oil as imported for fuel oil.

The Customs Court

In addition to evidence concerning the nature of the gas oil, Commonwealth introduced testimony and documentary evidence allegedly demonstrating administrative practice and legislative intent with

respect to the statutory provisions relevant to this appeal. Commonwealth took the depositions of several customs officials of the port of Philadelphia—Edward Henry, district director, Arthur Grill, chief chemist, and Frederick Pantella, lead import specialist. Some 14 entries of gas oil made at Philadelphia during the period 1961–1968 were brought into evidence. Those entries were found by the customs laboratory to have the characteristics of No. 5 fuel oil and were classified as fuel oil.

The Customs Court, in its opinion, relied upon the testimony of the Philadelphia customs officials in finding the existence of long-standing, established practice at that port with respect to the classification of Venezuelan gas oil having the characteristics of No. 5 fuel oil. The court found, as indicated above, that the imported gas oil likewise “meets commercial specifications for No. 5 fuel oil.” It accordingly held the imported merchandise to fall within the scope of the established practice. Specifically, the Customs Court reasoned as follows:

The testimony of the Philadelphia customs officials establishes that Philadelphia is a leading port for importations of petroleum. * * *

The evidence herein further shows that the importations in question possess the characteristics of No. 5 fuel oil and as such are similar to the importations which were classified at the port of Philadelphia as fuel oil until 1967. * * * [W]e conclude that this [merchandise] is similar to Venezuelan gas oil which was entered at the port of Philadelphia.

In this connection it is basic that a long established practice by the Bureau of Customs, the agency entrusted with the administration of the tariff laws, will be given great weight in the interpretation of those laws. [Citations omitted.] It appears from the evidence that the practice at the port of Philadelphia was to classify importations such as those at bar pursuant to the appropriate provision for fuel oil, and that this classification represented the established practice in these matters.

Defendant has failed to come forward with a justification for the change in customs treatment accorded the instant importation[s]; but rather has primarily addressed itself to the contention that the provisions for fuel oils are [use] provisions which are not applicable to importations utilized for purposes other than fuel.

The court gave controlling effect to the “customs practice, which continued uninterruptedly at least until 1967,” of classifying gas oil having the characteristics of No. 5 fuel oil, and therefore suitable for such use, pursuant to the provisions for fuel oil. The court held the “weight of competent evidence” to require a judgment sustaining Commonwealth’s protests.

Is Long-Standing, Established Administrative
Practice An Issue Relevant to This Appeal?

The Government contends that there is insufficient evidence upon which to conclude that established administrative practice existed. However, the Government more fundamentally assails consideration of such practice as inappropriate where, as allegedly here, there is no ambiguity in the statutory provisions. The Government contends that the fuel oil provisions before us are plainly "use" provisions, that the Customs Court so held with respect to I.R.C. § 3422 in *Cities Service Oil Co. v. United States*, 16 Cust. Ct. 110, C.D. 994 (1946), and that to fall within the classification of a "use" provision, merchandise must be chiefly used according to that "use." The relevance of the consideration integral to the trial court's decision is therefore the threshold legal issue.

Long-established administrative practice has several conceptual connotations. Section 315(d) of the Tariff Act of 1930, codified as 19 USC 1315(d), provides that:

No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the weekly Treasury Decisions of notice of such ruling; but this provision shall not apply with respect to the imposition of anti-dumping duties.

In *Asiatic Petroleum Corp. v. United States*, 59 CCPA 20, 440 F.2d 1309, C.A.D. 1029 (1971), this court held a reference to "an established and uniform practice" in a letter written by the Acting Commissioner of Customs to the collector of customs at New York to constitute a "finding" of such a practice by the delegate of the Secretary of the Treasury within the meaning of § 315(d). Customs could effect a change in that practice only by following procedures consistent with § 315(d) which include publishing notice of such change.

There is no assertion in the present case that a "finding" of "an established and uniform practice" with respect to Venezuelan gas oil has ever been made by the Secretary of the Treasury or his representative. We are therefore not here concerned with established practice in the statutory sense, a change in which requires due notice as prescribed.

[8] Long-established administrative practice may bear on the construction of the tariff laws as noted by the Customs Court. See *United States v. Fred Whitaker Co.*, 40 CCPA 19, 29, C.A.D. 492 (1952); *United States v. Electrolux Corp.*, 46 CCPA 143, C.A.D. 718 (1959). However, this court has recognized such practice to be comparable to other extrinsic aids to ascertaining legislative intent which come into

play when the construction of a statutory provision is in doubt. See *Armand Schwab & Co. v. United States*, 32 CCPA 129, 133, C.A.D. 296 (1945); *United States v. C. I. Penn*, 27 CCPA 242, 245-46, C.A.D. 93 (1940). Indeed, in *C. J. Tower & Sons v. United States*, 44 CCPA 41, 44, C.A.D. 634 (1957), the court expressed agreement with the proposition that an administrative practice prejudicial to the importer shown to be clearly erroneous would be reversible despite its age. In *C. J. Tower*, the court also recognized the reenactment of an ambiguous statute without substantive change to have incorporated the administrative construction where that construction had been followed consistently for a long time. See also *United States v. Edward I. Petow & Son*, 34 CCPA 55, 64, C.A.D. 343 (1946).

In the present case, the importer alleges a forty-five year period up to 1967 of consistent and uniform classification of Venezuelan gas oil as fuel oil. If in fact there has been an established practice of that tenure surviving the various tariff legislation enacted during that period, an interpretation of "fuel oil" in the provisions in issue consistent with that practice may be strongly suggested. Compare *Electrolux*, supra, 46 CCPA at 146; *United States v. H. Bayersdorfer & Co.*, 16 Ct. Cust. Appls. 43, 46, T.D. 42717 (1928).

We do not think the court below erred in looking to the evidence of established practice. The tax provisions which Commonwealth claims to be the proper classification expressly includes within the term "fuel oil," fuel oil known as gas oil." The Government apparently is of the view that the gas oil must first be chiefly used as fuel oil to be a fuel oil known as gas oil. However, an interpretation that brings gas oil having the characteristics of fuel oil within that phrase is a reasonable alternative. In light of the statutory evolution, the TSUS provision which does not expressly include "fuel oil known as gas oil," but which does newly refer to "distillate and residual" fuel oils, is likewise amenable to several reasonable constructions. Under the circumstances, we conclude that the statutory provisions at issue are ambiguous as to the intended scope and meaning of the term "fuel oil." Resort to extrinsic aids in ascertaining the legislative intent is therefore warranted in this case.

The Government advances the *Cities Service* case, supra, as a judicial construction of the fuel oil provision of I.R.C. § 3422. In *Cities Service* the importer claimed that the merchandise, which was invoiced as "tar," was properly classifiable and taxable as fuel oil. The Government contended that the tar had to be chiefly used as fuel oil to be so classified. The Customs Court there agreed with the Government, but found that in fact the tar was chiefly used as fuel oil. The Customs Court here regarded *Cities Service* as merely including the tar at issue before the court within the fuel oil provision and not as excluding all

substances which might not be chiefly used as fuel oil. We agree with that analysis. Since the goods in *Cities Service* were found to be chiefly used as fuel oil, the court's concession to the Government position was not essential to the decision. The court did not have to carefully weigh the merits for and against characterization of the fuel oil provision as a "use" provision as a prerequisite to rendering a dispositive decision. Moreover, the considerations relevant to a determination of whether or not "tar" is fuel oil did not include evaluation of the phrase "fuel oil * * * including fuel oil known as gas oil." *Cities Service* is not a judicial construction of the provisions here involved which persuades us of a legislative intent regarding the tariff and tax treatment of gas oil having the characteristics of No. 5 fuel oil.

In sum, we think that the evidence of legislative intent offered by Commonwealth is relevant to the issues before us, and we proceed to a review of that evidence.

The Practice at Philadelphia

As noted above, the customs officials Henry, Grill and Pantella testified and evidence of entries made between 1961 and 1968 was introduced. The Customs Court appears to have relied principally on the evidence bearing on the practice at Philadelphia. However, the Government advances several basic contentions with which we agree.

While the testimony of the deponents does establish that Philadelphia is a leading port of entry for petroleum, it also indicates that it is a minor port of *gas oil* entry. On cross-examination, in 1968, Grill stated:

The Port of Philadelphia has imported within the last eight years approximately only a dozen cargoes of gas oil, which is a minor proportion of that imported throughout the rest of the country.

Pantella, on cross-examination, characterized the volume of gas oil importation relative to that of other petroleum products at Philadelphia as "small." By contrast, the entries involved in this appeal, made at Ponce, Puerto Rico, during the period 1962-1968, numbered in excess of 50. We think the assumption that the experience at Philadelphia is such that the view of its customs officials regarding classification of gas oil is more credible than that of customs officials at other ports lacks evidentiary basis.

We also agree with the Government that the inquiry relevant to long-established administrative practice should not be one which weighs the merits of the practice at one port against the merits of the practice at another port occurring approximately contemporaneously. We hold that the evidence of the classification practice employed at

Philadelphia during the period 1961-1968 is insufficient to prove established administrative practice.

As to the period prior to 1961, we are directed to no specific evidence of entries of gas oil at Philadelphia and their classification. Commonwealth relies on the testimony of Pantella wherein the witness agreed that under the various tariff and tax acts commencing with the Act of 1922, gas oil would have been classified in the same paragraph as fuel oil. The Customs Court made general reference to Pantella's testimony. However, our review of Pantella's deposition fails to reveal any substantial basis for concluding that in fact there had been shipments of gas oil prior to 1961 received at Philadelphia and that there had in fact been a practice of classifying such gas oil as fuel oil. The tenor of Pantella's testimony is that he assumed that gas oil would have been so classified and that he was aware of no shipments which had been classified otherwise. Pantella himself began working for the Bureau of Customs in 1962.

We think that Commonwealth has failed to come forth with affirmative, convincing evidence of the existence of a long-established practice at Philadelphia. Lacking substantial evidence in the record, the finding of the Customs Court in this regard cannot be sustained.

Commonwealth's Overall Case for Legislative Intent
to Classify Gas Oil as Fuel Oil

Our conclusions respecting the alleged established practice at Philadelphia to some extent undermine the rationale of the Customs Court as expressed in its opinion. However, Commonwealth's overall case for legislative intent with regard to gas oil is broader and includes other evidence which was before the court below. We feel that the overall case presented by Commonwealth is convincing.

Commonwealth's Exhibit 2 is a copy of a portion of the Summaries of Tariff Information, prepared in 1948 by the Tariff Commission. The copied portion discusses the tariff rate applied to "Distillate fuel oil (including gas oil)" under the various tariff and tax laws commencing with the 1922 Tariff Act. It notes that "[i]n the trade agreement with Venezuela [discussed supra] the excise tax on imports of crude petroleum, topped crude, fuel oil, and gas oil was reduced ***."

Exhibit 34 is a copy of a portion of Schedule A of the Statistical classification of Commodities Imported into the United States published in 1950 by the Department of Commerce. The document refers to the classification of "Gas oil (including Diesel oil) and finished distillate fuel oil." This classification was distinguished from that for "Unfinished oils for further processing, including topped crude."

The letters of Commissioners Johnson and Dow, T.D. 50060 and T.D. 53107, have been discussed above in connection with the evolution of the statutory provisions. They were introduced as Commonwealth's Exhibits 33 and 5, respectively. The Johnson letter made reference to Commercial Standards CS12-29, published in 1929, as disclosing certain standards. Collectors were advised that oil "known as fuel oil or gas oil" which met those standards was to be classified under the fuel oil provision. Exhibit 32 is a copy of Commercial Standard CS12-48, the 1948 revision of 1929 standards. That publication has been discussed *supra* in connection with the consideration of the nature of the gas oil and the finding that there was substantial evidence to support the trial court's determination that the imported gas oil possesses the characteristics of No. 5 fuel oil.

The totality of the evidence lends substantial support to a conclusion that the executive departments considered gas oil possessing the characteristics of fuel oil to be properly classified and assessed with duty at the same rate as fuel oil irrespective of the particular importation's actual or chief use. The Bureau of Customs assumed and directed such classification, and there is no evidence tending to indicate that classification in that manner was not observed. The case for a long-standing administrative *construction* of the relevant fuel oil provisions as encompassing gas oil appears to us to be strong.

We stress that the language of the statutory provisions is plainly amenable to that construction. "Fuel oil known as gas oil" is a phrase which on its face could well include gas oil having the characteristics of fuel oil. As we attempt to assess the correctness of the interpretation placed upon it by the Customs Court, we are moved by the weight of the evidence to agree that the various statutory provisions were, and should be, interpreted according to that construction. In the absence of evidence, or even argument, which might persuade us to consider that in adopting the TSUS the Congress sought to modify the scope of the I.R.C. provision for fuel oil, we are not disposed to assume such an intent. We accordingly find that the construction given the I.R.C. provision applies as well to the TSUS item.

The Government has failed to offer any convincing rebuttal to the evidence we have mentioned. At oral argument, Government counsel referred to the Commissioners' letters and the Summaries as very "general." We think their import is clear and that, in fact, they are quite specific. We have no doubt that the Commissioners and the Tariff Commission as then constituted would have regarded the present importations to be properly classified as fuel oil or "fuel oil known as gas oil."

At oral argument there was some discussion of the ability of the Bureau of Customs to change its mind with respect to classification.

As noted above, the Bureau can make administrative rulings and change rulings within the scope of its authority by following due procedures. Commonwealth has argued that only the Congress can now change the classification of gas oil. We agree not because we would agree with a proposition that an agency can be frozen into one interpretation, but rather because we have considered the contemporaneous construction of certain Acts of Congress in ascertaining the proper meaning of language contained in those acts. We have to our satisfaction determined the intent of Congress with respect to ambiguous language.

We conclude that the Customs Court correctly interpreted the relevant statutory provisions as providing for the classification of the imported gas oil as fuel oil. The decision and the judgment of the Customs Court in No. 5489 is accordingly *affirmed*.

SUMMARY

The judgment of the Customs Court in Appeal No. 5488 is *affirmed*.
The judgment of the Customs Court in Appeal No. 5489 is *affirmed*.

Decisions of the United States Customs Court

United States Customs Court

One Federal Plaza
New York, N.Y. 10007

Chief Judge

Nils A. Boe

Judges

Paul P. Rao
Morgan Ford
Scovel Richardson
Frederick Landis

James L. Watson
Herbert N. Maletz
Bernard Newman
Edward D. Re

Senior Judges

Charles D. Lawrence
David J. Wilson
Mary D. Alger
Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Review Decisions

(A.R.D. 314)

R. J. SAUNDERS & Co., INC. v. UNITED STATES

Chemicals

BURDEN OF PROOF—EVIDENCE

Where appellant seeks to establish that merchandise is subject to appraisalment on the basis of United States value, as defined in section 402a (e), Tariff Act of 1930, as amended, it must first negate the existence of foreign and export value for such and similar merchandise. Even if it proves such merchandise was not freely offered for sale to all purchasers within the meaning of the statute for home consumption or for exportation to the United States during the rele-

vant period, it must still establish either that there was no similar merchandise or that similar merchandise was not so offered.

Since the record is devoid of evidence, it cannot be held that there was no merchandise similar to thiourea within the meaning of the statute, on the theory that, being a chemical compound, it is unique and there cannot be a similar product. Appellant has failed to negate the existence of a foreign or export value for similar merchandise; therefore, the appraised values must be sustained.

APPLICATION FOR REVIEW OF REAPPRAISEMENT DECISION 11771

Reappraisement No. R61/1601 and six others

Entered at New York, N.Y.
Entry Nos. 840067, etc.

Second Division, Appellate Term

[Affirmed.]

(Decided June 19, 1973)

Sharretts, Paley, Carter & Blauvelt (Gail T. Cumins of counsel) for the appellant.

Harlington Wood, Jr., Assistant Attorney General (Bernard J. Babb, trial attorney), for the appellee.

Before RAO, FORD, and NEWMAN, Judges

Rao, Judge: This is an application for review of a decision and judgment of the trial court, sustaining the appraised values of a chemical known as thiourea, exported from Japan during the period from October 1958 through July 1964. *R. J. Saunders & Co., Inc. v. United States*, 69 Cust. Ct. 221, R.D. 11771 (1972) (motion for rehearing denied October 20, 1972).

Thiourea appears on the Final List published by the Secretary of the Treasury pursuant to section 6(a) of the Customs Simplification Act of 1956, under the heading "Industrial Chemicals." 93 Treas. Dec. 14, 29, T.D. 54521 (1958). The imported merchandise was appraised on the basis of foreign value, as that value is defined in section 402a(c), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956. It is claimed that the merchandise should have been appraised on the basis of United States value, as that value is defined in section 402a(e) of said act.

The trial court pointed out that in order to reach United States value, plaintiff must first disprove the existence of a foreign and an export value for such and similar merchandise. It stated that plaintiff had adduced persuasive evidence that thiourea was not freely offered for sale either for home consumption or for exportation to the United

States, but that the record was devoid of evidence that similar merchandise was not freely sold in Japan in the home market or for export, or that no similar merchandise existed. It therefore held that plaintiff had not met its burden of proof.

In a recent case, *Nichols & Company, Inc. v. United States*, 59 CCPA 67, C.A.D. 1041, 454 F.2d 1183 (1972), our appellate court held that even if appellant proved that "such" merchandise was not freely offered for home consumption during the relevant period, in order to negate the existence of foreign value, it still had to establish that "similar" merchandise was not so offered. It determined that appellant had not sustained its burden of proof on the ground that the record lacked evidence concerning what, if any, merchandise was "similar" in a statutory sense to the imported goods and whether a foreign value existed therefor.

It is appellant's position in the instant case that thiourea, being a chemical compound, is unique in that it has a fixed formula and a spatial arrangement which differs from every other chemical compound; that it has its own chemical and physical properties; that every other compound differs from it in or more of the following characteristics: The elements of which it is composed; the number of atoms of each element of which it is composed; the internal arrangement of its elements; and the physical and chemical properties of the compound itself. It therefore claims that there is no merchandise similar to the imported thiourea except thiourea produced by other manufacturers.

However, no evidence has been presented to sustain this claim. A finding that merchandise is or is not similar to other goods must be based upon substantial evidence, not on inference, argument, or interpretation. *United States v. Wecker & Co.*, 16 Ct. Cust. Appls. 220, T.D. 42837 (1928); *United States v. Kraft Phenix Cheese Corp. et al.*, 26 CCPA 224, C.A.D. 21 (1938); *H. J. Heinz Company v. United States*, 43 CCPA 128, C.A.D. 619 (1956); *A. Zerkowitz & Co., Inc. v. United States*, 58 CCPA 60, C.A.D. 1005, 435 F.2d 576 (1970), *cert. den.*, 404 U.S. 831 (1971); *W. R. Zanes & Co. et al. v. United States*, 43 Cust. Ct. 568, Reap. Dec. 9557 (1959).

In support of its uniqueness claim, appellant quotes in its brief a definition of thiourea from Snell & Snell's *Chemicals of Commerce*, 2d edition (p. 296), as follows:

Thiourea, $\text{CS}(\text{NH}_2)_2$, is the product of reaction of carbon bisulfide and ammonia through the intermediate formation of ammonium thiocarbamate, or reaction of cyanamide with hydrogen sulfide. Both CP and technical grades serve for synthesis of organic sulphur compounds.

See also *Webster's Third New International Dictionary* (1967 edition):

thiourea: a bitter crystalline compound $\text{CS}(\text{NH}_2)_2$ that is analogous to urea with the oxygen replaced by sulfur and resembles urea in chemical properties, that is obtained by heating ammonium thiocyanate or by adding hydrogen sulfide to cyanamide, and that is used chiefly in the separation of hydrocarbons (as various liquid normal paraffin hydrocarbons from branched-chain hydrocarbons), in organic synthesis, and esp. formerly in synthetic resins.

However, similarity or dissimilarity is not determined for tariff purposes solely by the chemical formula or molecular structure of a product.

In *Scharf Bros. Co. (Inc.) v. United States*, 16 Ct. Cust. Appls. 347, T.D. 43089 (1928), the trial court found rock candy sold for export was similar to that sold for home consumption on the ground that it was similar in chemical composition. The court of appeals rejected that ground, stating that "a thing may be similar chemically and yet not similar within the meaning of the word as used" in the tariff act. It then found similarity on the ground that both types of candy were made in the same kind of vats, by the same process, and out of the same material; they were approximately the same value, identical in composition, taste, color, and use, differing only in the size of crystals. They were held commercially interchangeable.

In *United States v. Philipp Bros. Chemicals, Inc.*, 56 Cust. Ct. 816, A.R.D. 208 (1966), it was held that special grades of sodium peroxide were not similar to normal grades on the basis of evidence showing that they had different characteristics, specifications, and uses, and that one would not be used in place of the other.

See also *BASF Colors & Chemicals, Inc. v. United States*, 56 CCPA 47, C.A.D. 952 (1969), where the question was whether a chemical known as HMD was subject to appraisement on the basis of American selling price because it was similar to certain coal-tar products provided for in paragraphs 27 and 1651, Tariff Act of 1930. The court stated (p. 52):

In holding that the evidence failed to overcome the presumption attaching to the appraisement that HMD was similar to one or more of the products mentioned in paragraphs 27 or 1651, the [trial] court found:

In sum, plaintiff has introduced much detailed evidence on dissimilarity in molecular structure, but the testimony as to differences in other properties, uses, purposes, and applications is more general. It does show some differences in properties between aromatic and aliphatic compounds as classes, but Dr. Mark admitted that there were some over-

lapping cases. There is no evidence establishing whether or not HMD is in the overlapping category. While the difference in molecular structure may be of great importance to chemists, Congress was legislating in terms of commerce. Therefore, an important, if not the most important, factor is whether the difference in molecular structure indicates any wide difference in practical applications of the two classes of chemicals, and particularly whether HMD has similar commercial uses to any of the products listed. On this point, the evidence is unsatisfactory.

The terms "such or similar" are not used synonymously in tariff statutes, but alternatively. "Such" means identical merchandise and "similar" refers to merchandise which is like but not identical. *United States v. Irving Massin & Bros.*, 16 Ct. Cust. Appls. 19, T.D. 42714 (1928), and cases cited; *Meadows, Wye & Co. (Inc.) et al. v. United States*, 17 CCPA 36, T.D. 43324 (1929).

It may well be that no chemical compound is identical to another, but there is no reason to suppose one may not be similar to another for tariff purposes.

In the *Massin* case, *supra*, the court held that "if goods are made of approximately the same materials, are commercially interchangeable, are adapted to substantially the same uses, and are so used, ordinarily, they are similar." (Emphasis supplied.)

In *United States v. Wecker & Co.*, *supra*, the court said (p. 225):

* * * The question of similarity is, in each case, to be measured by much the same homely rule that applies to the prospective customer who enters a store seeking some utilitarian article of a certain specified name and style; he finds the article requested is not in stock but that another article, of approximately the same price and which will perform the same functions, is capable of the same use and may be substituted therefor, is available. Such an article is a similar article, notwithstanding the price, the methods of construction, and the component materials may be somewhat different; but, for all utilitarian purposes, one is a substitute for the other. * * *

In *C. J. Tower & Sons v. United States*, 50 CCPA 76, C.A.D. 824 (1963), the court discussed the factors to be considered in determining similarity: similarity of use and materials, and commercial interchangeability. It held that the overriding consideration was commercial interchangeability.

In the cases cited by appellant, where dissimilarity was found, the findings were based on proof that the two classes of merchandise had different uses and materials, and were not commercially interchangeable. *United States v. Kraft Phenix Cheese Corp. et al.*, *supra*; *United States v. Stephen Rug Mills*, 16 Cust. Ct. 369, Reap. Dec. 6283 (1946);

United States v. F. Victor & Achelis, 17 CCPA 412, T.D. 43864 (1930).

While it may be that there is no product similar in material and use to thiourea or commercially interchangeable with it, this cannot be determined without evidence, on the theory that thiourea, being a chemical compound, is unique and there cannot be a similar product.

Appellant construes a statement in *Millmaster International, Inc., et al. v. United States*, 58 Cust. Ct. 711, 717, R.D. 11304 (1967), that there was "neither a statutory foreign value for such (Degussa's) thiourea, nor a statutory foreign value for similar (Trostberg's) thiourea," as a specific recognition by the court that the only merchandise similar to thiourea was thiourea produced by other manufacturers. The court made no such finding, but was satisfied on the record presented that neither such nor similar merchandise was freely offered for sale or sold for home consumption or for exportation in West Germany during the relevant period. The decisions in the Appellate Term and in the Court of Customs and Patent Appeals turned on quite another point. *Millmaster International, Inc., et al. v. United States*, 61 Cust. Ct. 613, A.R.D. 247 (1968), *rev'd*, 57 CCPA 108, C.A.D. 987, 427 F. 2d 811 (1970).

Appellant also claims that the fact that thiourea is specified in the Final List without additional or qualifying words is an indication that there is no product which is similar thereto. It argues that if this court were to conclude that there is merchandise similar to thiourea the result would be that thiourea would be valued under the "old" law on the basis of the foreign value of merchandise which is not subject to "old" law provisions. This would follow only if the similar merchandise were not itself specified in the Final List. Moreover, we do not think the naming of an article in the Final List was intended to indicate that no similar merchandise could exist.

Appellant has cited *National Carloading Corp. v. United States*, 60 CCPA —, C.A.D. 1080, 469 F. 2d 1398 (1972), where it was proved, without contradiction, that the importer was at the relevant time, the sole importer of unfinished mica condenser sections. The court held that appellant had established *prima facie* that there was no other merchandise of the "same class or kind" and that it could not have been expected to anticipate any reliance upon unfinished condenser sections of materials other than mica and finished mica condensers as merchandise of the "same class or kind."

We are concerned here, however, with the burden resting on appellant to establish the nonexistence of similar merchandise. Directly in point is *Nichols & Company, Inc. v. United States*, *supra*, where the court said:

* * * Other than the above isolated lay references to "similar" merchandise, the record is remarkably devoid of evidence con-

cerning what if any merchandise was "similar" in the statutory sense to the importations at bar at the relevant time and in the relevant place, let alone whether or not a statutory foreign value existed for such merchandise. Accordingly, we agree with the Appellate Term, that appellant failed to negate the existence of a French foreign value for "similar" merchandise * * *.

Since the record in the instant case is likewise devoid of evidence concerning what, if any, merchandise is similar in the statutory sense to thiourea, appellant has failed to meet its burden of negating the existence of a foreign or an export value for similar merchandise. The appraised values must be sustained.

On the record presented, we find as facts:

1. That the imported merchandise consists of thiourea which was exported from Japan during the period from October 1958 through July 1964.

2. That the merchandise was appraised on the basis of foreign value, as defined in section 402a(c) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, at a value of 220 yen per kilogram, net packed.

3. That the merchandise is described on the Final List of the Secretary of the Treasury, 93 Treas. Dec. 14, 29, T.D. 54521 (1958).

4. That the evidence herein fails to establish that at the times of exportation of the involved merchandise no articles similar to thiourea existed.

5. That the evidence herein fails to establish that at the times of exportation of the involved merchandise, similar merchandise was not freely offered for sale for home consumption or for exportation to the United States.

We conclude as matters of law:

1. That without evidence it cannot be held that no merchandise similar to thiourea existed, on the theory that, being a chemical compound, it is unique and no similar product can exist.

2. That the proper basis of appraisement for the imported merchandise is foreign value, as defined in section 402a(c) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956.

3. That the correct values for the imported merchandise are the appraised values.

The judgment of the trial court is affirmed.

(A.R.D. 315)

UNITED STATES *v.* MITSUI & Co., Ltd.*Animal feeds*

EXPORT VALUE—SALES IN UNITED STATES

Where exporter's American branch fixed the prices at which the imported merchandise was sold to purchaser in the United States, and did not transmit any offers or orders of the purchaser to the exporter for acceptance or rejection, appraisements on the basis of export value predicated upon the branch's sales to the purchaser in the United States are erroneous. *United States v. Massce & Co., et al.*, 21 CCPA 54, T.D. 46379 (1933).

UNITED STATES VALUE—ALLOWANCE FOR PROFIT AND GENERAL EXPENSES

Testimony of the importer's witness that markup of \$2.00, included in the selling price of imported merchandise, covered profit and "whatever expenses are involved in this business" held insufficient to establish the proper allowance for profit and general expenses under section 402(c) (1), Tariff Act of 1930, as amended (19 U.S.C. § 1401a(c) (1)). *National Carloading Corp. v. United States*, 60 CCPA —, C.A.D. 1080 (1972).

APPLICATION FOR REVIEW OF REAPPRAISEMENT DECISION 11767

Reappraisement No. R67/10846 and 16 others

Entered at Portland, Oregon.

Entry Nos. 7608, etc.

Second Division, Appellate Term

[Reversed.]

(Decided June 19, 1973)

Harlington Wood, Jr., Assistant Attorney General (*Patrick D. Gill*, trial attorney), for the appellant.

Barnes, Richardson & Colburn (*Earl R. Lidstrom* of counsel) for the appellee.

Before RAO, FORD and NEWMAN, Judges

NEWMAN, Judge: This is an application for review by the Government of the decision and judgment in *Mitsui & Co., Ltd., Mitsui & Co. (USA), Inc. v. United States*, 68 Cust. Ct. 266, R.D. 11767 (1972), respecting 17 of 34 consolidated appeals for reappraisement, wherein the trial court upheld the United States values claimed by appellee.

All 34 appeals for reappraisement involved merchandise invoiced as "Tricaphos", an ingredient used in animal feed, exported from Japan between 1964 and 1967. The merchandise was manufactured in Japan

by Onoda Chemical Industries Co., Ltd. (Onoda), and sold by Onoda to a Japanese trading company, Mitsui & Co., Ltd. (Mitsui-Japan). Prior to April 1966, Mitsui-Japan shipped the Tricaphos to appellee, its unincorporated branch in Seattle (Mitsui-Seattle), who sold the importations to its United States customer, Inman & Co. (Inman).

The 17 appeals for reappraisal (subject to this review) cover only the shipments from Mitsui-Japan to Mitsui-Seattle during the period of July 1964 through February 1966. Thereafter, in April 1966, Mitsui-Seattle was incorporated as a subsidiary of Mitsui-Japan, and called Mitsui & Co. (U.S.A.) (Mitsui-U.S.A.). The remaining 17 appeals for reappraisal (which are not the subject of this review) involved shipments to Mitsui-U.S.A.

The importations were appraised on the basis of export value, as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 (19 U.S.C. § 1401a(b)). These appraisements are expressed on the official papers as follows: an amount in U.S. dollars (which varies according to the date) per short ton, packed, less ocean freight and marine insurance (in amounts checked by the appraising officer on the papers), less import charges and transportation costs in the United States (in amounts checked by the appraising officer on a sheet attached to the papers and supplied by the custom house broker), less included duty in the amount of 10 percent.

Appellant claims that the appraisements are correct.

Appellee claims that there is no export value for the merchandise, and that United States value as defined in section 402(c) (19 U.S.C. § 1401a(c)) is the proper basis for appraisal. The United States values claimed are the appraised values, less \$2.00 per short ton, which is asserted by appellee to cover an allowance for commissions under section 402(c) (1).

The parties have stipulated that the merchandise is not on the Final List of the Secretary of the Treasury, T.D. 54521 (R.4).

STATUTES INVOLVED

Section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956:

(b) EXPORT VALUE.—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisal, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such

price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

Section 402(c) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956:

(c) UNITED STATES VALUE.—For the purposes of this section, the United States value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal market of the United States for domestic consumption, packed ready for delivery, in the usual wholesale quantities and in the ordinary course of trade, with allowances made for—

(1) any commission usually paid or agreed to be paid, or the addition for profit and general expenses usually made, in connection with sales in such market of imported merchandise of the same class or kind as the merchandise undergoing appraisement;

* * * * *

THE RECORD

The record comprises the oral testimony of two witnesses, two affidavits and other documentary evidence submitted on behalf of appellee; and the official papers which were received in evidence as an unmarked exhibit (R.2). Appellee conceded that Mitsui-Seattle was a branch of the exporter (R.5). Appellant conceded that by written directive the Bureau of Customs required the importer to make a non-purchase declaration on the special customs invoice in entries made prior to April 1966 (R.18-22).

Appellee called Stanley L. Grimes, assistant district director in charge of classification and value at the port of Portland, Oregon, who was the appraising official on the dates of entry. Mr. Grimes testified that his appraisements were derived from the so-called resale price of Mitsui-Seattle to its United States customer, Inman, by taking certain deductions for charges and expenses incurred in shipping the merchandise from Japan and importing it into the United States.

Appellee's other witness was N. Hayashi, who testified that he had been employed by Mitsui-U.S.A. for nearly thirteen years¹ and was in charge of "general merchandise and textiles"; that Tricaphos were among the lines for which he was responsible; and that he began buying Tricaphos from Mitsui-Japan in 1960.

¹ Hayashi undoubtedly meant that he had been employed for thirteen years by Mitsui-Seattle and its successor, Mitsui-U.S.A.

Concerning the sequence of events in the relationship between Mitsui-Seattle and Inman, we adopt the trial court's succinct summary of Mr. Hayashi's testimony:

* * * Prior to August 1963, a different importer had been purchasing Tricaphos, but decided to end importing. Inman & Co., one of the prior importer's distributors, contacted Hayashi and expressed interest in handling future imports. After discussions of quantity requirements, Hayashi contacted Mitsui-Japan for a price. To this amount he then added estimated duty, costs of handling, customs clearance charges and \$2.00 per short ton as a markup to cover profit and expenses of the Seattle office. This price was then conveyed to Inman & Co. The price quoted to Inman & Co. and the subsequent written contracts entered into with Inman & Co., were not conveyed to Mitsui-Japan, which simply delivered Tricaphos to Mitsui-Seattle and later Mitsui-U.S.A., as ordered. With regard to the sale of Tricaphos, Mitsui-Seattle and later Mitsui-U.S.A. acted without supervision or interference or restrictions from Mitsui-Japan. No part of the United States markup was transmitted to Mitsui-Japan nor did Mitsui-Japan pay money to Mitsui-U.S.A. or Mitsui-Seattle for such sales. In short, with the exception of inquiries regarding the price and capability of supplying the instant merchandise, the entire transaction was conducted either between Mitsui-Seattle and the American purchaser or Mitsui-U.S.A. and the American purchaser.

An affidavit executed by Toshihisa Arai dated September 11, 1969 is to the following effect: The affiant is the assistant manager of the fertilizer department of Mitsui-Japan. His duties include buying Tricaphos from the manufacturer, Onoda, and reselling such product. Mitsui-Japan sold Tricaphos (at certain contract prices set forth in the affidavit) to its branch in the United States during the period 1964 through April 1966. During such time, Mitsui-Japan never received an offer to purchase Tricaphos from Inman, nor did Mitsui-Japan negotiate directly with, offer to sell to, or sell Tricaphos to Inman.

When Mitsui-Japan sold Tricaphos to its branch in the United States, Mitsui-Japan did not exercise any control over the price at which its branch could resell Tricaphos, or over the customers to whom its branch could sell. Mitsui-Seattle was not required to submit its contracts with or orders from customers to Mitsui-Japan before entering into such contracts or accepting such orders; and the branch was not required to keep Mitsui-Japan advised of terms, prices, quotations, market conditions or inquiries from its prospective customers. The branch did not submit contracts or orders for Tricaphos from its customers to Mitsui-Japan; nor was Mitsui-Japan advised by its branch of terms, prices, quotations, market conditions or inquiries from prospective customers.

DECISION OF TRIAL COURT

So far as relevant to the issues raised in this review, the trial judge held that the transactions between Mitsui-Japan and Mitsui-Seattle were not "sales," since such transactions constituted merely "the movement of the goods from one portion to another of the same corporate entity. Such an action cannot, in any way, give rise to an export value within the meaning of the valuation statute." 68 Cust. Ct. at 270. Further, relying upon *United States v. Massce & Co. et al.*, 21 CCPA 54, T.D. 46379 (1933), the trial court held that export value could not be predicated upon the sales to Inman (upon which sales the appraisements were based) because those sales were not made in Japan, but rather were made in the United States by Mitsui-Seattle.

After eliminating export value as a possible basis for appraisement (prior to Mitsui-Seattle's assumption of corporate status), the trial court then held that appellee had established its alternative claim for United States value.

THE ISSUES

1. Did the trial court correctly hold that the appraised export values could not be predicated upon the sales to Inman?
2. Did the trial court correctly hold that appellee had established its alternative claim for United States value?

EXPORT VALUE

It is, of course, fundamental that appellee had the burden of first rebutting the presumption of correctness attaching to the appraised export values, and then proving the United States values it claims. *Minkap of California, Inc. v. United States*, 55 CCPA 1, C.A.D. 926 (1967). Hence, it is appropriate initially to consider whether the trial court correctly held that export value was eliminated as a basis for appraisement prior to the incorporation of Mitsui-Seattle.

Appellant contends that the court below erred in that export value is predicable upon sales made by Mitsui-Japan *through* Mitsui-Seattle to Inman. Such contention is untenable. The record clearly shows that Mitsui-Seattle, not Mitsui-Japan, sold to Inman and fixed the prices at which the Tricaphos were sold. Moreover, Mitsui-Seattle acted with complete independence from Mitsui-Japan in selling Tricaphos to Inman. In point of fact, except for shipping the product to Mitsui-Seattle, Mitsui-Japan had nothing to do with the transactions concerning Inman. Consequently, we agree with the holding of the trial judge that:

The sales from Mitsui-Seattle to Inman & Co. did not give rise to an export value because, in my opinion, it was not a sale in the country of exportation. It was a sale taking place in the

United States since the principal negotiations and the confirmation of the sales agreement took place in the United States. I view the inquiries of Mr. Hayashi, the head of Mitsui-Seattle, in querying Mitsui-Japan for a price and the availability of the merchandise, as being in the nature of informational inquiries and not indications that the power of confirmation existed elsewhere than in the Seattle branch. On this point, I consider the facts herein similar to those in *United States v. Massce & Co.; Rechsteiner, Hirschfeld & Co.; Landenburg Thalman & Co.*, 21 CCPA 54, T.D. 46379 (1933). * * *

In *Massce*, the Swiss manufacturer's selling agency in New York (or its traveling salesmen) took orders from purchasers in the United States for wearing apparel, and delivery of the merchandise was made by the manufacturer to the selling agency or directly to the American purchasers. The appellate court held that the dutiable value of the merchandise was United States value rather than export value, noting that all offers for sale and all sales were made in the United States; that no purchasers in the United States transmitted their offers to buy to Switzerland; that no offers to sell the merchandise were made in Switzerland; that there was no contractual relationship entered into in Switzerland between the manufacturer and the purchasers in the United States; and that orders were finally accepted or rejected by the New York branch house.

Appellant attempts to distinguish *Massce* from the present case on the basis that Inman's orders to purchase Tricaphos were subject to acceptance by Mitsui-Japan.² However, the record does not establish that Inman's orders were subject to acceptance in Japan, but on the contrary, affirmatively establishes precisely the reverse.

Appellant stresses that before Mitsui-Seattle entered into any sales agreements with Inman, the importer first entered into agreements with Mitsui-Japan to obtain the merchandise. We think it apparent that no prudent seller would agree to sell a product that he does not have in his inventory or at least is assured of obtaining from his supplier before he is obliged to make delivery to his customer. In any event, whatever the reason for the particular sequence of agreements, such sequence does not establish that Inman's offers or orders were accepted or approved by Mitsui-Japan.

² Undoubtedly *Massce* would not be applicable here if Mitsui-Seattle had sent Inman's orders to Japan for acceptance. In *Massce*, the appellate court pointed out in dictum that "if offers by purchasers had been transmitted to Switzerland and there accepted by the Swiss manufacturer, we should not hesitate, under the facts of this case, to hold that export value was established * * *." 21 CCPA at 59. See also *V.I. Jewelry Manuf. Corp. v. United States*, 63 Cust. Ct. 723, 735, V.D. 156 (1969); *Dorf International, Inc., et al. v. United States*, 61 Cust. Ct. 604, 612-13, A.R.D. 245, 291 F. Supp. 690 (1968); *New England Foil Corp. v. United States*, 8 Cust. Ct. 630, 635-36, R.D. 5591 (1942), *aff'd sub nom. United States v. New England Foil Corp.*, 10 Cust. Ct. 596, 597, R.D. 5856 (1943); *United States v. F. O. Gerlach & Co. et al.*, 7 Cust. Ct. 494, 501-502, R.D. 5443 (1941).

We have considered the other grounds urged by appellant to distinguish *Massce* and have concluded that they too are without merit. In sum, we are clear that the rationale of *Massce* precludes finding an export value upon the basis of sales to Inman, and accordingly, the appraisements made on such basis are erroneous.

UNITED STATES VALUE

Turning to appellee's claimed values, we now consider the correctness of the trial court's holding that "plaintiff [appellee] has successfully proven a United States value of those importations entered prior to the incorporation of Mitsui-Seattle".

The only element of United States value that appellant now disputes is an allowance by the trial court of \$2.00 per short ton for profit and general expenses pursuant to section 402(c) (1). On this aspect of the case, the trial judge held that the "uncontradicted testimony as to the importer's actual 'markup' suffices to supply proof as to the proper deduction for profit and general expenses", relying upon this Appellate Term's decision in *National Carloading Corporation v. United States*, 65 Cust. Ct. 830, A.R.D. 280, 319 F. Supp. 1291 (1970).

Appellant contends that reversal of the trial court's judgment is required in light of the holding of the Court of Customs and Patent Appeals in *National Carloading Corp. v. United States*, 60 CCPA —, C.A.D. 1080 (1972), *aff'g* 65 Cust Ct. 830, A.R.D. 280 (1970), which was rendered subsequent to the decision of the trial judge in this case. In view of the pivotal relationship of *National Carloading* to the present litigation, the opinions in that case of the trial court, the Appellate Term and the Court of Customs and Patent Appeals are summarized.

In *National Carloading*, the sole issue was whether the importer had established the proper allowance for profit and general expenses under section 402(c) (1) on certain unfinished mica condenser sections. Although the importer was engaged in selling product lines other than unfinished mica condenser sections, the importer did not attempt to allocate the profit and general expenses included in its "gross markup" to any particular product. The importer's president explained that he made no allocation, "[b]ecause our business is a small operation and we handle different items. The same people do different types of work, [and] we have no departmentalized sections. In short, there is no possible way that I can see to assign a given expense to a given item".

The trial court held that plaintiff's proof failed to establish the proper allowance for profit and general expenses for the following reasons (63 Cust Ct. 594, at 598-600):

Though plaintiff has established without rebuttal that it was the only importer of unfinished mica condenser sections, it was

not thereby relieved of the obligation of showing what were the *actual profits and general expenses incurred in sales* of merchandise of the same class or kind. It was therefore incumbent upon plaintiff to provide this court with evidence of what were *the elements of the general expenses and profit in its sales of the condenser sections.* * * * [Emphasis added.]

Especially in view of the testimony that the selling price of unfinished mica condenser sections was calculated upon an approximate formula, which did not take into consideration actual direct expenses, it does not appear that the gross markup figures shown are meaningful.

Neither is there any evidence of the general expenses which plaintiff asserts make up part of the figure for "markup". Without a showing of what general expenses were taken into consideration where the cost of general expenses and the amount of profit were computed, how is the court to determine whether or not *proper elements of general expenses* have been included. Plaintiff's *ipse dixit*, that X dollars represents the total of general expenses and profit is a conclusion without supporting evidentiary facts. See and compare *Brooks Paper Company v. United States*, *supra* [40 CCPA 38, C.A.D. 495 (1952)]. [Emphasis added.]

While this court recognizes the difficulty which plaintiff has encountered in meeting the requirements of this section, the lack of proof of general expenses *attributable to the mica condenser sections* must therefore cause this appeal to fail. The problem that plaintiff has incurred in maintaining proper records of general expenses, while understandable, can have no bearing on the requirements of the statute. [Emphasis added.]

On application for review, this Division (Appellate Term) affirmed the judgment of the single judge (65 Cust. Ct. 830, A.R.D. 280 (1970)). We held that the phrase in section 402(c)(1), "addition [made] for profit and general expenses" is "virtually synonymous with what accountants and tradesmen call 'markup'". Hence, we determined that appellant was not required to show the actual profit and general expenses "*incurred*". However, the judgment of the trial court sustaining the appraised values was affirmed by us on the predicate that the importer's proof was inadequate to establish that the unfinished mica condenser sections constituted a "class or kind" of merchandise, rather than a particular product. Consequently, the actual markup of the sole importer of unfinished mica condenser sections was not accepted as representing the addition for profit and general expenses actually made in connection with sales of "merchandise of the same class or kind", within the purview of section 402(c)(1) of the Tariff Act of 1930, as amended.

On appeal, the Court of Customs and Patent Appeals affirmed, but expressed agreement with the rationale of the trial judge and disagreement with our approach. The appellate court observed:

In the present case, it appears that Intercontinental [the ultimate consignee] sells a variety of goods. There is no indication that in fixing the markup for the unfinished mica condensers the importer *isolated and included only the general expenses, and, similarly, profit, attributable to the sale of this class of goods.* * * * [Emphasis added.]

And further:

* * * Appellant has *not* proved that the asserted markup is the sum of general expenses *incurred in the sale of unfinished mica condensers* and profit added *in connection with the sale of unfinished mica condensers.* * * * [Emphasis by CCPA.]

We agree with appellant's contention that the judgment below must be reversed in light of the appellate court's decision in *National Carloading*. The sole "proof" offered by appellee to support the \$2.00 allowance was the testimony of witness Hayashi (R.49):

Q. Now, during your previous testimony, Mr. Hayashi, you stated that when you set a price, or when you made a price, for Tricaphos to Inman Company, you added as your markup two dollars to the figure that you had received from Mitsui, plus charges that you estimated.

A. Yes.

Q. Was there any reason why you selected two dollars?

* * * * *

A. *There was no particular reason. I just felt that two dollars would be sufficient to cover our profit and whatever expenses are involved in this business.* [Emphasis added.]

The above testimony fails to sustain appellee's burden of proof under section 402(c) (1). As in *National Carloading*, there is no evidence in this case of the *actual* profit and general expenses "incurred" in sales of Tricaphos. Nor is there any evidence of the "elements" of general expenses covered by the \$2.00 figure. Thus, as stated by the trial judge in *National Carloading* (63 Cust. Ct. at page 600): "Plaintiff's *ipse dixit* that [two] dollars represents the total of general expenses and profit is a conclusion without supporting evidentiary facts". And to paraphrase our appellate court in *National Carloading*, "[t]here is no indication that in fixing the markup for the [Tricaphos] the importer [Mitsui-Seattle] isolated and included only the general expenses, and, similarly, profit, attributable to the sale of this class of goods".³

³ Hayashi was not only in charge of buying and selling Tricaphos, but he was also in charge of "general merchandise and textiles" (R.29). Thus, the importer's business included several product lines, as was the situation in *National Carloading*.

We must stress that the decision by the trial court in this case was rendered before the appellate court's decision in *National Carloading*; and as previously noted, the trial court relied upon our rationale in *National Carloading* in holding that the testimony of Hayashi "as to the importer's actual 'markup' suffices to supply proof as to the proper deduction for profit and general expenses". Understandably, therefore, the trial court erred concerning that aspect of the case.

Appellee conceded on the oral argument that if the \$2.00 markup represented "profit" and "general expenses" within the purview of section 402(c) (1), the appellate court's holding in *National Carloading* is indistinguishable (Tr. Arg. 31). However, appellee contends that Mitsui-Seattle's \$2.00 markup constitutes a "commission"; and on that basis *National Carloading* is distinguishable from the present case. Such contention is bottomed upon the trial court's finding that the transaction between Mitsui-Japan and Mitsui-Seattle was not a "sale", and that in entering the merchandise the Government required appellee to make a nonpurchase declaration.

Appellee's contention that the \$2.00 markup was a "commission" is entirely without merit. If as agreed by both parties and found by the trial court, the transaction between Mitsui-Japan and Mitsui-Seattle was not a "sale", but was merely the movement of the goods from one portion to another of the same corporate entity, then obviously such corporate entity could not pay itself a "commission" on sales to Inman. Additionally, appellee's declaration of nonpurchase is consistent with appellee's concession that it was a branch of the exporter, and is also consistent with the finding of the trial court that the merchandise was merely transferred from one portion to another of the same corporate entity (Mitsui & Co., Ltd.).

In sum, appellee has failed to establish that its markup of \$2.00 represents either a commission or the proper allowance for profit and general expenses under section 402(c) (1), and thus appellee has not proved its claimed United States values. Consequently, the appraised values, although erroneous, stand as the dutiable values of the merchandise. *Ellis Silver Co., Inc. v. United States*, 63 Cust. Ct. 647, R.D. 11688 (1969), *aff'd*, 67 Cust. Ct. 564, A.R.D. 293 (1971), *aff'd*, 60 CCPA —, C.A.D. 1100 (1973). Accordingly, the judgment below sustaining the claimed United States values of the merchandise is reversed.

FINDINGS OF FACT

1. The importations consist of a product known as "Tricaphos", exported by Mitsui-Japan during the period from July 1964 to February 1966, and entered at Portland, Oregon.

2. The merchandise was shipped to Mitsui-Seattle, the exporter's branch office in the United States. The transactions between Mitsui-

Japan and Mitsui-Seattle were not sales, but merely the transfer of goods from one portion to another of the same corporate entity.

3. The merchandise does not appear on the Final List of the Secretary of the Treasury, T.D. 54521.

4. The merchandise was appraised on the basis of export value as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, at various values indicated on the official papers.

5. The merchandise was sold by Mitsui-Seattle to Inman.

6. The appraised values were predicated upon the sales to Inman.

7. No offers or orders by Inman for Tricaphos were sent by Mitsui-Seattle to Mitsui-Japan for acceptance or approval.

8. Prices quoted by Mitsui-Seattle to Inman and the subsequent written contracts between them were not conveyed to Mitsui-Japan.

9. Mitsui-Seattle acted without supervision, interference, or restriction by Mitsui-Japan in the sale of Tricaphos to Inman.

10. Appellee included a markup of \$2.00 in the sale price of the Tricaphos to Inman to cover a profit and the expenses of its business.

11. The \$2.00 markup did not represent a commission.

12. Tricaphos was only one of several product lines sold by appellee.

13. Appellee offered no evidence to show the actual profit and general expenses "incurred" in sales of Tricaphos.

14. Appellee offered no evidence to show what expenses were covered by its "markup".

15. Appellee offered no evidence to prove that in fixing a markup of \$2.00 for the Tricaphos it isolated and included only the general expenses, and, similarly, profit, attributable to the sale of that class of goods.

CONCLUSIONS OF LAW

1. The appraisements in the 17 appeals for reappraisal, covered by this review, are erroneous since they were predicated upon sales made in the United States.

2. Appellee failed to establish that its markup of \$2.00 represents either a commission or the proper allowance for profit and general expenses under section 402(c) (1).

3. Since appellee failed to establish its claimed United States values, the appraised values stand as the dutiable values.

The judgment of the trial court is reversed. A judgment herein will be entered accordingly.

Decisions of the United States Customs Court

Custom Rules Decision

(C.R.D. 73-13)

STAHLWOOD TOY MFG. CO., INC. v. UNITED STATES

Memorandum to Accompany Order

Court No. 68/1206 and 33 others

Port of New York

(Dated June 22, 1973)

Serko & Sklaroff (Murray Sklaroff, Joel K. Simon and Irving A. Mandel of counsel) for the plaintiff.

Harlington Wood, Jr., Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

LANDIS, Judge: This is one of ten or more similar motions seeking relief from orders entered during the March 1973 motion part of this court.

In this motion, selected for discussion, counsel for plaintiff seek a rehearing and reconsideration (rule 12.1) of an order entered March 27, 1973, which said order had granted defendant's motion that certain allegations made in approximately 34 complaints be made more definite and certain.¹ The order directed plaintiff to amend the complaints and, *inter alia*, make more definite the allegations with respect to the merchandise and rates of duty referred to in the complaints.

Counsel for plaintiff have further requested opportunity to orally argue the motion and for leave to appeal should the motion be denied. A memorandum and affidavit are submitted in support of the motion. Defendant has filed a memorandum in opposition to plaintiff's motion.

Going back over the matter which plaintiff has asked be reconsid-

¹ The order granting the motion covered a schedule of approximately 34 cases identified in defendant's motion for more definite statement. The schedule is attached to and made a part of the order entered on this memorandum opinion.

ered, it is apparent that the complaints filed represent part of the belated and concerted effort of counsel to remove the cases covered by the complaints, along with a multitude of other cases, from the reserve files of this court to avoid their dismissal (rule 14.6(c)), see, *Bendix Mouldings, Inc., et al. v. United States*, 70 Cust. Ct. —, C.R.D. 73-6 (1973) (wherein some 177,000 causes of action pending before this court and placed in the reserve file were alluded to).

In style, form, and content the several complaints appear to be the product of standard complaints couched in general statements, drafted to cover, in whole or in part, one or more sundry items of merchandise and rates of duty applying to groups of cases. The standard complaints, after being reproduced in sufficient number, were then filed in individual cases. The complaint in each case requires reference to the official entry papers to determine which item or items of merchandise, and which rate or rates of duty stated in the complaint are specifically applicable to the case in which the complaint was filed. As heretofore indicated, defendant moved that the complaints be amended and made more definite and certain in a form that complied with rules 4.3(b) and 4.5B, asserting that the complaints do not comply with said rules and that it could not properly answer the complaints in a manner that would narrow the issues for trial.

Counsel for plaintiff, in its memorandum in support of the instant motion for rehearing and reconsideration, assert that after entry of this court's order directing that each of the complaints be made more definite and certain, defendant [without the benefit of a prior motion to make definite and certain] "nevertheless was able to answer eighty-eight complaints, similar in all material respects to those here in issue". (Page 2, plaintiff's memorandum.) Plaintiff has attached to its memorandum the following: a copy of the complaint in *A. S. Beck Shoe Corp. v. United States*, Court No. 70/66560, alleged to be similar to those filed in these cases; a copy of defendant's answer to the Beck Shoe complaint; a list of the eighty-eight cases wherein defendant filed answers to complaints allegedly not substantially different from those in these cases.

Defendant, in opposition to plaintiff's present motion, concedes that it [defendant], without having filed a prior motion to make more definite and certain, filed answers to similar complaints as are involved at bar. Defendant, nevertheless, contends that this "is not sufficient" to support plaintiff's motion "inasmuch as plaintiff was aware of this fact [that answers had been filed] at the time it filed its opposition to defendant's motions for more definite statements, and alleged [emphasis quoted] it in its memoranda in opposition to defendant's motions for more definite statements * * *." (Page 4, defendant's

memorandum.) Defendant further allows that the complaint in *Beck Shoe* is different from the complaints in these scheduled cases because the merchandise subject of *Beck Shoe* is clearly set forth and the various rates of duty are tied to the years of importation.

It is not possible to assess the merits of defendant's assertion that the complaints in these cases are different from the *Beck Shoe* complaint without examining the complaints, in each of the approximately 34 cases. Since defendant did not draw the motions for more definite statement in terms of individual cases, the broad assertions of both sides may or may not apply in any individual case. Whatever plaintiff may have alluded to in its opposition to defendant's motion for more definite statement, in my opinion, is irrelevant because it did not relate to defendant's ability to answer complaints in other cases containing general allegations with respect to sundry merchandise and rates of duty. The *Beck Shoe* complaint is substantially similar in form and style to the complaint in Court No. 68/1206, which is the lead case covered by this memorandum opinion. The *Beck Shoe* complaint differs only in the allegations describing the merchandise and setting forth the rates of duty assessed.

The positions taken by the parties in the matter of the related motions for more definite statement and for rehearing are based, not so much on the specifics of any of the approximately 34 individual cases, as on broad general concepts of defendant's right to compel the opposing party to file complaints complying with the court rules, and the plaintiff's cry that under the court rules its complaints should be assessed for their substance rather than form. There is little doubt that the substance of a complaint can be materially clouded by a lack of adherence to requirements as to its form. This being so, in my previous order granting defendant's motion to make the complaints more definite and certain, I leaned to the position that where counsel, particularly those who regularly practice before this court, are seeking relief for their clients in complaints they have filed, they should respect and observe, in form and content, the pertinent requirements of the rules of the court applicable thereto.

As of October 31, 1970, approximately 177,000 cases were pending in the "Reserve File" of the court, as heretofore indicated. The disposition of those cases acknowledgedly posed difficult problems for various counsel representing respective plaintiffs therein, including counsel for plaintiff at bar. The filing of complaints in an inordinately great number of cases by a specified date was required or plaintiff would have suffered their dismissal. The court rules are not unnecessarily rigid tools. They are not intended to create problems of compliance but rather to assist the court and parties in matters pending before the court. Where a party encounters unusual circumstances

making compliance with a particular court rule difficult, if not impossible, it would be, in my opinion, a desirable practice to ask the court for relief in the particular case or cases. It does not redound to the credit of counsel regularly practicing in the court that, without proper prior application to the court, the complaints in these approximately 34 cases were filed without strict adherence to the court rules. *Bendix Mouldings, Inc., et al. v. United States, supra.*

On the other side of the coin, as it now comes out for the first time in this motion for rehearing, it appears that at about the same time the defendant won the approval of the court to have the complaints in these approximately 34 cases made more definite and certain, defendant, without similar motion to make definite and certain, did in fact file answers to complaints allegedly substantially similar to the complaints herein. Defendant's memorandum in opposition attempts to avoid but does not traverse that fact.

This inconsistent position taken by defendant [the government], in my opinion, amounts to a negation of the defendant's earlier contention as to the merit of its motion to make definite and certain. To the extent that it hampers litigation and unnecessarily slows the work of the court I cannot approve, with respect to complaints which are substantially in the same form, inconsistent acts not appearing to be patently distinguishable.

In closing this discussion, the manner in which counsel for both sides have proceeded in the matter of these complaints and related motions points up the fruitlessness of counsel attempting in court to ventilate their proficiency in the exercise of legal gamesmanship in a manner doing credit to neither.

Upon reconsideration, therefore, I am of the opinion that by reference to the official entry papers and the various items of merchandise and rates of duty recited in the complaint, the complaints in many of these cases can be answered and the controversy limited to such items of merchandise and rates of duty which, as recited in the complaint, can be identified in the official entry papers covered by the complaint.

Accordingly, order will enter granting the motion for rehearing and vacating and setting aside the previous order that the complaints be made more definite and certain, denying the motion for more definite statement, without prejudice, and directing defendant to answer the complaints filed in these cases or to take such other action as may be appropriate in the circumstances of an individual case or listed group of cases, the latter, on affidavit that the facts in the group of cases are the same in all material respects as the facts in the titled lead case identified on a schedule listing said group of cases.



Decisions of the United States Customs Court

Abstracts Abstracted Protest Decisions

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

DEPARTMENT OF THE TREASURY, *June 25, 1973.*

VERNON D. ACREE,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED		HELD		BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate	Par. or Item No. and Rate	Par. or Item No. and Rate		
P73/635	Ford, J. June 19, 1973	American Sanitary Rag Company et al.	66/43364, etc.	Item 654.70 16%	Item 655.22 12.5% Protest 68/24314- 7377 under Consol. No. 68/14905 severed and dismissed; 69/5108 and Consol. No. 68/20035 with- drawn from motion; certain Protests under Consol. No. 68/40226, enu- merated in de- cision and judge- ment, severed as to certain entries, and complaints to be filed within 30 days	Item 655.22 12.5% Protest 68/24314- 7377 under Consol. No. 68/14905 severed and dismissed; 69/5108 and Consol. No. 68/20035 with- drawn from motion; certain Protests under Consol. No. 68/40226, enu- merated in de- cision and judge- ment, severed as to certain entries, and complaints to be filed within 30 days	Summary judgment	Chicago Earphones	
P73/636	Rao, J. June 20, 1973	Valentina, Ltd.	70/4087, etc.	Item 352.02 42.5%	Item 741.50 20%		Agreed statement of facts		New York Wearing apparel of wool fully covered with beads, bugles or spangles
P73/637	Ford, J. June 20, 1973	Border Brokerage Co., Inc.	68/40886 etc.	Item 664.10 10.5% or 9%	Item 692.40 9.5% or 8.5%		Border Brokerage Com- pany, Inc. v. U.S. (C.D. 4238)		Blaine (Seattle) Patrick log loaders

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F73/633	Landis, J. June 20, 1973	Nucleonic Products, Inc.	69/34649	Item 625.30 16%	Item 628.25 9%	Agreed statement of facts	Los Angeles Unwrought single crystals in lucet form
F73/639	Landis, J. June 20, 1973	United China & Glass Co.	68/7093, etc.	Par. 212 60% or 48% and 10% per doz. pos.	Par. 212 45%	New York Merchandise Co., Inc. v. U.S. (C.D. 3463)	Baltimore Decorated porcelain cups and saucers
F73/640	Landis, J. June 20, 1973	F. B. Vandegriff & Co., Inc.	67/7887	Item 623.94 27%	Item 711.55 16%	F. W. Woolworth Company v. U.S. (C.D. 4245)	Philadelphia Barometer poodles
F73/641	Watson, J. June 20, 1973	J. Gerber & Co., Inc.	70/55468	Item 637.20 15%	Item 730.10 5%	International Expeditors, Inc. v. U.S. (C.D. 4048)	Philadelphia Tie-out stakes
F73/642	Watson, J. June 20, 1973	Seedman International Corp., et al.	69/45739, etc.	Item 732.35 24% and 21% (items marked "A") Item 732.36 30%, 27%, 24% and 21% (items marked "B")	Item 637.20 15% and 13% (items marked "A") Item 774.60 17%, 15%, 13.5% and 11.5% (items marked "B")	Agreed statement of facts	New York Reflectors, not solely or chiefly used as parts of bicycles; not of cast iron or tin plate (items marked "A"); of rubber or plastics (items marked "B")
F73/643	Maletz, J. June 20, 1973	American Bristle & Hair Drawing Co.	67/82099	Item 156.30 1¢ per lb.	Item 186.55 Free of duty	American Bristle & Hair Drawing Co. et al. v. U.S. (C.A.D. 1048)	San Francisco Hog hair
F73/644	Maletz, J. June 20, 1973	Border Brokerage Co., Inc.	67/61556	Item 136.87 1¢ per lb. upon the entire weight	Item 136.87 1¢ per lb. (40% of total gross weight) Item 133.25 Duty free (60% of total gross weight)	Border Brokerage Co., Inc. v. U.S. (C.D. 4257)	Blaine (Seattle) 40% tree seeds and 60% woody residue commin- gled in readily ascertain- able quantities

CUSTOMS COURT

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED		HELD		BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate	Par. or Item No. and Rate	Par. or Item No. and Rate		
P73/645	Maletz, J. June 20, 1973	Gallagher & Ascher Com- pany	70/46691, etc.	Item 646.02 14% or 12%	Item 692.27 6.6% or 5.5%			Gallagher & Ascher Com- pany v. U.S. (C.D. 3899)	Chicago Lock plugs for gas tank caps
P73/646	Newman, J. June 20, 1973	Elpo Industries, Inc.	67/55595, etc.	Item 651.33 3 $\frac{1}{2}$ % per lb. plus 17%	Item 649.57 17%			Arbor Import Corp. v. U.S. (C.D. 3935)	New York Ice cream scoops having mechanical features
P73/647	Re, J. June 20, 1973	National Silver Co.	69/35212	Item 772.06 18.9% per lb. plus 15%	Item 772.15 15%			Davay Products, Inc. v. U.S. (C.D. 3880)	New Bedford (Boston) Plasticware snack sets, cheese servers, salad bowls, lazy susans, etc.
P73/648	Re, J. June 20, 1973	Sports Industries, Inc.	69/32565	Item 705.86 35%	Item 734.05 13%			Sports Industries, Inc. v. U.S. (C.D. 4125)	Los Angeles Rubber gloves for use in sports

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	UNIT OF VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R73/171	Re, J. June 20, 1973	Plywood & Door Manufacturers Corporation et al.	R68/2012, etc.	Export value: Unit value indicated on entry papers in red ink, less the invoiced ocean freight and in- surance, prorated	Not stated	Plywood & Door Northern Corporation v. U.S. (R.D. 10883)	Cleveland Birch Plywood
R73/172	Re, J. June 20, 1973	Plywood & Door Northern Corpora- tion	R64/23026, etc.	Export value: Unit value indicated on entry papers in red ink, less the invoiced ocean freight and in- surance, prorated	Not stated	Plywood & Door Northern Corporation U.S. (R.D. 10883)	Philadelphi Birch plywood
R73/173	Re, J. June 20, 1973	Plywood & Door Northern Corpora- tion	R68/2444	Export value: Appraised unit value set forth in invoices, less the invoiced ocean freight and insurance, prorated, plus (where deducted in appraise- ment) invoiced load- ing charges, prorated	Not stated	Plywood & Door Northern Corporation v. U.S. (R.D. 10883)	Charleston, S.C. Birch plywood

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	UNIT OF VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R73/174	Re, J. June 20, 1973	Plywood & Door Western Corporation	R62/1535, etc.	Export value: Unit value indicated on entry papers in red ink, less the invoiced ocean freight and insurance, prorated	Not stated	Plywood & Door Northern Corporation v. U.S. (R.D. 10893)	San Francisco Birch plywood
R73/175	Re, J. June 20, 1973	Plywood & Door Western Corporation	R64/23303	Export value: Appraised unit value, set forth in invoices, less the invoiced ocean freight and insurance, prorated, plus (where deducted in appraisal) invoiced loading charges, prorated	Not stated	Plywood & Door Northern Corporation v. U.S. (R.D. 10893)	Los Angeles Birch plywood
R73/176	Re, J. June 20, 1973	Plywood & Door Western Corporation	R66/1167	Export value: Appraised unit value, set forth in invoices, less the invoiced ocean freight and insurance, prorated, plus (where deducted in appraisal) invoiced loading charges, prorated	Not stated	Plywood & Door Northern Corporation v. U.S. (R.D. 10893)	Seattle Birch plywood
R73/177	Re, J. June 20, 1973	United States Plywood Corp.	R39/4619, etc.	Export value: Net appraised value less 7 1/4%, net packed	Not stated	U.S. v. Gatz Bros. & Co. et al. (C.A.D. 927)	Los Angeles Japanese plywood

Application for Review Filed with
Appellate Division

Geigy Chemical Corporation, Sandoz, Inc., and Ciba Chemical & Dye Co. *v.* United States, reappraisements R66/10120-S, R65/16280 and R65/20992.—CHEMICALS. Entered at New York, N.Y. Appeal from R.D. 11775 by defendant.

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in Appealed Cases

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APPEAL 5471.—Czarnikow-Rionda Company *v.* United States.—SUGAR—ADDITIONAL DUTIES—TSUS.—C.D. 4229 affirmed November 2, 1972. C.A.D. 1071.

APPEAL 5481.—United States *v.* F. W. Myers & Company, Inc.—CRAWLER-TYPE TRACTORS—OTHER TRACTORS—TRACTORS SUITABLE FOR AGRICULTURAL USE—TSUS.—C.D. 4256 affirmed May 3, 1973. C.A.D. 1097.

JUNE 21, 1973

APPEAL 5475.—United States *v.* Acec Electric Corp.—ELECTRIC MOTORS USED ON INDUSTRIAL SEWING MACHINES—PARTS OF SEWING MACHINES—MOTORS—TSUS.—C.D. 4220 reversed March 8, 1973. C.A.D. 1091.

APPEAL 5498.—Trans-Atlantic Company *v.* United States.—HINGES—DOOR CLOSERS—TSUS.—C.D. 4288 affirmed February 8, 1973. C.A.D. 1088.

JUNE 22, 1973

APPEAL 5508.—Ogden Marine, Inc., and Platte Transport, Inc. *v.* United States.—DISMISSAL OF CIVIL ACTION No. 71-12-01917 FOR LACK OF JURISDICTION.—Order of March 7, 1972 (not published) affirmed March 1, 1973. C.A.D. 1090.

Appeal to United States Court of
Customs and Patent Appeals

APPEAL 5541.—General Instrument Corporation *v.* United States.—T.V. DEFLECTION YOKES—WIRE OF U.S. ORIGIN USED IN ASSEMBLY ABROAD—PARTS OF TELEVISION APPARATUS—DUTY EXEMPTION DISALLOWED—TSUS.

In this case, black and white television deflection yokes exported from Taiwan were classified in liquidation upon entry at New York

under item 685.20, Tariff Schedules of the United States, as parts of television apparatus. Plaintiff claimed that certain magnet and lead wire which was utilized abroad in the making of the yokes was entitled to the duty-free treatment specified in item 807.00. The wire, fabricated in the United States and exported to Taiwan on spools, was utilized in Taiwan to make coils and cable harnesses, which, in turn, were assembled with other articles to produce the imported yokes. Plaintiff contends that the subject wire constituted "products of the United States" or "fabricated components, the product of the United States" within the meaning of item 807.00 or item 807.00, as amended by Public Law 89-806, respectively, which provides for payment of duty upon the full value of the imported articles less the cost or value of products of the United States. The Court held the wire products did not constitute "components" of the imported yokes at the time of exportation to Taiwan so as to be entitled to the duty allowance provided for under item 807.00, *supra*. *Amplifone Corporation v. United States*, 65 Cust. Ct. 58, C.D. 4054 (1970), followed.

It is claimed that the Customs Court erred in holding that the imported merchandise consisting of TV deflection yokes is not entitled to a duty-free allowance for products of the United States incorporated in the imported merchandise pursuant to item 807.00, *supra*; in holding that the provisions of item 807.00 do not apply to the two types of wire, products of the United States, which were exported for assembly abroad into the imported yokes, because the assembly process consisted of a two-step procedure in which the exported products were first utilized in the production, respectively, of coils and cable harness, denominated by the court as the *components* of the imported yokes, which upon being produced from the exported wire were then assembled into the completed yoke; in holding that the provisions of item 807.00 do not apply to the said products of the United States because the incorporation of the exported magnet wire into the coil of the yoke, and of the other wire into the harness for the yoke, constituted the production of components separate and distinct from the assembly of the imported yokes; in holding that the provisions of item 807.00 do not apply to the said U.S. products because the incorporation of the two types of wire into the coils and cable harness of the yokes abroad denominates such exported wire at the intermediate assembly stage of coils and harness as products of the foreign country in which the assembly was carried out rather than as products of the United States within the meaning of item 807.00; in holding that the provisions of item 807.00 do not apply to the said wire as exported from the United States because, in view of the subsequent assembly of the wire into coils and harness for the imported yokes, the wire did

not have the status of "fabricated components" exported for use in the assembly of the imported yokes within the meaning of item 807.00; in holding that the said products of the United States, exported for use abroad in the assembly of the imported yokes, though in the state of fabricated products when exported, were not in the state of fabricated components within the meaning of item 807.00 because of their incorporation into the coils and harness subassemblies prior to the incorporation of such subassemblies into the completed yoke in the final stage of the assembly process; in holding on the authority of its decision in *Amplifone Corporation v. United States*, 65 Cust. Ct. 58, C.D. 4054 (1970), that the incorporation of fabricated materials, products of the United States, into a subassembly which is then incorporated into the final assembly in the form of the imported merchandise prevents said exported products from being considered as fabricated components of the final assembly within the meaning of item 807.00; in holding that the term "fabricated components, the product of the United States" as incorporated in item 807.00 by Public Law 89-806, was intended by the Congress to change the meaning of the term "products of the United States" in item 807.00 as originally enacted in 1963 so as to exclude from the scope of the item, fabricated products exported for use in an assembly process in which at intermediate stages of the process such exported materials were brought to the state of completed subassemblies which were then combined by assembly into the final imported product; in holding that the use of the wire in the assembly process abroad in the production of the intermediate subassemblies of coils and harness constituted the "further fabrication" of the wire within the meaning of that quoted term as used in item 807.00; in holding that the two types of wire which were exported for use in the assembly of the imported yokes did not constitute "components" of the yokes at the time the wire was exported from the United States because of their use abroad in the assembly of the coils and cable harness subassemblies which were then combined by assembly into the completed yoke; in overruling the claim in the involved protest that the two types of wire of U.S. origin utilized in the assembly abroad of the imported yokes are entitled to duty-free treatment under item 807.00. Appeal from C.D. 4421.

Tariff Commission Notices

Investigations by the United States Tariff Commission

DEPARTMENT OF THE TREASURY, July 5, 1973.

The appended notices relating to investigations by the United States Tariff Commission are published for the information of Customs officers and others concerned.

VERNON D. ACREE,
Commissioner of Customs.

[TEA-I-28]

FERROCHROMIUM, FERROMANGANESE, FERROSILICON, FERROSILICON CHROMIUM,
FERROSILICON MANGANESE, CHROMIUM, MANGANESE AND SILICON

Discontinuance of Investigation

Notice is hereby given that the U.S. Tariff Commission, on June 28, 1973, discontinued investigation No. TEA-I-28, and cancelled the public hearing scheduled in connection therewith. The investigation was instituted on May 21, 1973, upon petition of the Ferroalloy Association, an industry trade association, under section 301(b)(1) of the Trade Expansion Act of 1962.

The investigation was discontinued, without a determination on its merits and without prejudice, at the request of the petitioner.

By order of the Commission:

KENNETH R. MASON,
Secretary.

Issued June 28, 1973.

(TEA-W-204)

WORKERS' PETITION FOR A DETERMINATION UNDER SECTION 301(c)(2) OF THE TRADE
EXPANSION ACT OF 1962

Notice of investigation

On the basis of a petition filed under section 301(a)(2) of the Trade Expansion Act of 1962, on behalf of the former workers of Young Ones, Inc., a wholly-owned subsidiary of RAI, Inc., Brooklyn, New York, the United States Tariff Commission, on June 26, 1973, insti-

tuted an investigation under section 301 (c) (2) of the Act to determine whether, as a result in major part of concessions granted under trade agreements, articles like or directly competitive with footwear for women, misses, and children (of the types provided for in items 700.43, 700.45, 700.55, and 700.60 of the Tariff Schedules of the United States) produced by said firm are being imported into the United States in such increased quantities as to cause, or threaten to cause, the unemployment or underemployment of a significant number or proportion of the workers of such firm or an appropriate subdivision thereof.

The optional public hearing afforded by law has not been requested by the petitioners. Any other party showing a proper interest in the subject matter of the investigation may request a hearing, provided such request is filed within 10 days after the notice is published in the *Federal Register*.

The petition filed in this case is available for inspection at the Office of the Secretary, United States Tariff Commission, 8th and E Streets, N.W., Washington, D.C., and at the New York City office of the Tariff Commission located in Room 437 of the Customhouse.

By order of the Commission:

KENNETH R. MASON,
Secretary.

Issued June 28, 1975.

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Burden of proof—evidence—where appellant seeks to establish that merchandise is subject to appraisal on the basis of United States value, as defined in sec. 402a(e), Tariff Act of 1930, as amended, it must first negate the existence of foreign and export value for such and similar merchandise. Even if it proves such merchandise was not freely offered for sale to all purchasers within the meaning of the statute for home consumption or for exportation to the United States during the relevant period, it must still establish either that there was no similar merchandise or that similar merchandise was not so offered. The court found that since the record was devoid of evidence, it could not be held that there was no merchandise similar to thiourea within the meaning of the statute, on the theory that, being a chemical compound, it was unique and there could not be a similar product; that appellant had failed to negate the existence of a foreign or export value for similar merchandise, and, therefore, the appraised values must be sustained. A.R.D. 314.

Export value—sales in United States—where the exporter's American branch fixed the prices at which the imported merchandise was sold to the purchaser in the United States, and did not transmit any offers or orders of the purchaser to the exporter for acceptance or rejection, appraisements on the basis of export value predicated upon the branch's sales to the purchaser in the United States were erroneous. A.R.D. 315.

United States value—allowance for profit and general expenses—Testimony of the importer's witness that markup of \$2.00, included in the selling price of the imported merchandise, covered profit and "whatever expenses are involved in this business" held insufficient to establish the proper allowance for profit and general expenses under sec. 402(c)(1), Tariff Act of 1930, as amended. A.R.D. 315.

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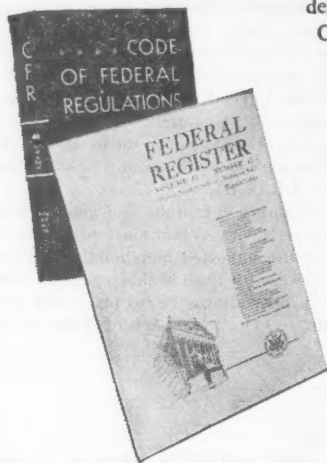
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